TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

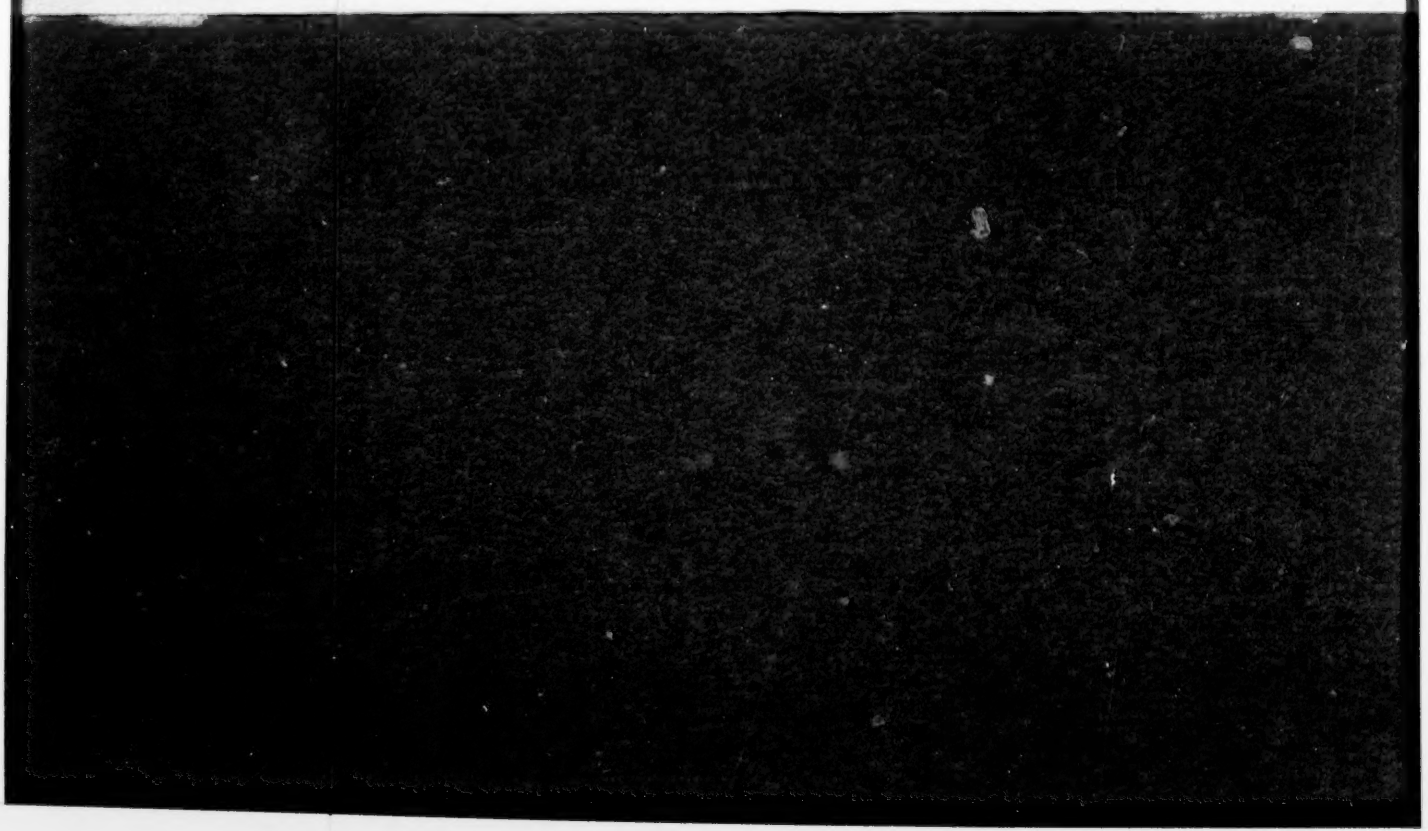
JOHN M. WARD, APPELLANT,

vs.

JOHN H. KERRIGAN AND DAVID [illegible],

APPEAL FROM THE [illegible] COURT

FILED [illegible]



(18,469.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 286.

JOHN M. WARD, APPELLANT,

vs.

MOSES H. SHERMAN AND DAVID HARDENBERG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants. } Complaint.

The plaintiff complaining of the defendants says that plaintiff is a resident of Oroville in the State of California. That the defendants are residents of Maricopa county, Arizona.

That heretofore to wit on the 23 day of August 1889 the defendant David Hardenberg executed and delivered to the plaintiff his certain promissory note whereof the following is a copy: that is to say:

"$12,500.00. PHŒNIX, A. T., *August* 23, 1889.

On or before October 1st, 1894 for value received I promise to pay to the order of John M. Ward at the office of C. F. Ainsworth in the city of Phœnix Arizona the sum of twelve thousand five hundred dollars with interest thereon from October 1st, A. D. 1889 until paid at the rate of eight per cent. per annum, interest payable annually at the expiration of each year, provided that the whole or any part of this note can be paid at any time.

DAVID HARDENBERG."

That the defendant Moses H. Sherman then and there for a valuable consideration then to him paid in writing endorsed upon said note guarranteed the payment thereof, which written guarrantee is in the words following, that is to say:

2 "For value received I guarrantee the payment of the within note and hereby waive demand and notice of protest.

M. H. SHERMAN."

That said note is due and unpaid. That there is now due thereon the sum of fifteen hundred dollars.

Wherefore plaintiff demands judgment for said sum of fifteen hundred dollars and for the costs of this suit.

KIBBEY & ISRAEL,
Attorneys for Plaintiff.

(Endorsed:) No. 2195. In the district court, Maricopa county. J. M. Ward, plaintiff, against Hardenberg and Sherman, defendant-. Complaint. Filed the 28th day of November, 1894, at 6 o'clock p. m. J. E. Walker, clerk.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants. } Complaint.

The plaintiff complaining of the defendants says that plaintiff is a resident of Oroville in the State of California. That the defendants are residents of Maricopa county, Arizona.

That heretofore, to wit on the 23rd day of August 1889, the defendant David Hardenberg, executed and delivered to the
3 plaintiff his certain promissory note whereof the following is a copy; that is to say:

"12,500.00. PHŒNIX, A. T., *August* 23, 1889.

On or before October 1st, 1894, for value received I promise to pay to the order of John M. Ward at the office of C. F. Ainsworth in the city of Phœnix, Arizona, the sum of twelve thousand five hundred dollars, with interest thereon from October 1st, A. D., 1889, until paid, at the rate of eight per cent. per annum, interest payable annually at the expiration of each year; provided that the whole or any part of this note can be paid at any time.

DAVID HARDENBERG."

That the defendant, Moses H. Sherman, then and there for a valuable consideration then to him paid, in writing endorsed upon said note guaranteed the payment thereof, which written guarantee is in the words following, that is to say:

"For value received I guarantee the payment of the within note and hereby waive demand and notice of protest.

M. H. SHERMAN."

That said note is due and is unpaid. That there is now due thereon the sum of fifteen hundred dollars.

Wherefore, plaintiff demands judgment for said sum of fifteen hundred dollars and for the costs of this suit.

KIBBEY & ISRAEL,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of Arizona Territory, in and for Maricopa county, hereby certify that I have compared the foregoing copy with the original complaint in the above-entitled action, filed in my office on
4 the 12 day of June 1895 and that the same is a true copy of the original and of the whole thereof.

Witness my hand and the seal of said court this 12 day of June, 1895.

[SEAL.]

J. E. WALKER, *Clerk*,
By LEWIS JORDAN,
Deputy Clerk.

(Endorsed:) Copy. No. 2195. In the district court Maricopa county. J. M. Ward plaintiff against Hardenberg and Sherman, defendant-. Complaint. Filed the 28th day of November 1894 at 6 o'clock p. m. J. E. Walker, clerk.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona, to David Hardenberg and Moses H. Sherman, defendant-, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff, in the district court of the third judicial district of the Territory of Arizona, in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona, in and for Maricopa county, this 28th day of November A. D. 1894.

[SEAL.]

J. E. WALKER,
Clerk of said District Court.

(Endorsed:) No. 2195. District court third judicial district, county of Maricopa, Territory of Arizona. J. M. Ward, plaintiff, *vs.* Hardenberg and Sherman, defendant-. Summons.

6 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

John M. Ward being first duly sworn, says: I am the plaintiff in the above-entitled action. The defendant is indebted to me on a contract in writing for the direct payment of money. Such contract was made and is payable in Arizona, Territory, and the payment of the same is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property. And the character of said indebtedness is as follows, to wit: A balance due on a certain promissory note in words and figures as follows, to wit:

"$12,500.00. PHŒNIX, A. T., *August* 23, 1889.

On or before October 1st, 1894 for value received I promise to pay to the order of John M. Ward at the office of C. F. Ainsworth in the city of Phœnix Arizona the sum of twelve thousand five hundred dollars with interest thereon from October 1st A. D., 1889 until paid, at the rate of eight per cent. per annum, interest payable annually at the expiration of each year; provided that the whole or any part of this note can be paid at any time.

DAVID HARDENBERG."

Which said note has endorsed thereon a guaranty of payment, in words and figures as follows to wit:

7 "For value received I guarantee the payment of the within note and hereby waive demand and notice of protest.

M. H. SHERMAN."

The balance due on said note being the sum of fifteen hundred dollars. That the same is due to plaintiff, over and above all legal set-offs and counter-claims, and that demand has been made for the payment of the amount due; and that the defendant is a non-resident of the Territory of Arizona. That an action is now pending between plaintiff and defendant for the recovery of said sum.

That this attachment is not sought for wrongful or malicious purposes, and the action is not prosecuted to hinder or delay any creditor or creditors of the defendant.

JOHN M. WARD.

Subscribed and sworn to before me, this 12th day of June, 1895.
[SEAL.] J. E. WALKER, *Clerk*.

(Endorsed:) No. 2195. In the district court Maricopa county. John M. Ward, plaintiff against David Hardenberg and Moses H. Sherman, defendant-. Affidavit on attachment. Filed the 12 day of May, 1895, at — o'clock, — m. J. E. Walker, clerk.

8 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

No. —. Answer and Counter-claim of M. H. Sherman.

Comes now the above-named defendant, Moses H. Sherman and files this his answer to the complaint of the plaintiff herein, and for a counter-claim against said plaintiff, alleges:

1.

That the residence of the plaintiff and defendants is as charged in the complaint herein.

2.

This defendant admits the making of the note as alleged in the complaint. Admits that he guaranteed the payment of the same as alleged in said complaint.

3.

This defendant further alleges, that heretofore, to wit, at Phœnix, Arizona, on the 23rd day of August, 1889, the plaintiff herein sold to the defendants herein the Sun Flower cattle range and all the cattle branded with the diamond brand (marked thus ◇),

9 together with the horses on said range, being about thirty in all; also all the wagons, saddles, mowing machines and other farming utensils used on said ranch, together with one-quarter section of land, being the northeast quarter of the southwest quarter of section 7, township 6 north range 9 east, for the sum of thirty-four thousand five hundred dollars.

That the title to all of said property was taken in the name of the said defendant David Hardenberg. That at the time of the purchase of said property as aforesaid these defendants made, executed and delivered to this plaintiff two certain promissory notes bearing date on August 23rd, 1889, each for the sum of $12,500.00, one of which notes was due on or before October 1st, 1894, and the other of said notes was due on or before the 1st day of October, 1897. That each of said notes was made payable to the order of J. M. Ward, and bore interest at the rate of 8 per cent. per annum, interest payable annually at the expiration of each year, and each of said notes was signed by the defendant David Hardenberg and on the back thereof was endorsed and signed "For value received I guarantee the payment of this note, and hereby waive the demand and notice of protest by the defendant M. H. Sherman."

That to secure the payment of said notes and interest thereon the said David Hardenberg at the same time and as a part of the same transaction, made, executed and delivered to the said plaintiff herein, a mortgage on all his right, title and interest in and

10 to that certain tract of land known and called the Sun Flower cattle range, in the Prescott land district theretofore

occupied by the said plaintiff herein, and by the said plaintiff sold and transferred to the said Hardenberg together with the diamond brand of cattle theretofore owned by the said plaintiff herein and by him transferred and sold to the said Hardenberg; also the Hardenberg cattle brand known and described as H. B., together with all cattle then on said Sun Flower range and Verde range branded with either of said brands or which should thereafter be owned by the said Sun Flower range in the Territory of Arizona, or by the said Hardenberg or his assigns, branded with either of said brands during the continuance of said agreement; also the horses then on said cattle range being in number about 25. That said mortgage was duly verified by the said David Hardenberg and the said plaintiff and duly acknowledged so as to entitle it to be filed for record in the office of the county recorder of Maricopa county, Arizona, and was by the said plaintiff herein duly filed for record in the aforesaid county on the 26th day of August, 1889. For a more particular description of the property in said mortgage described and of the contents thereof, reference is hereby made to a copy of the same marked Exhibit "A" and made a part of this answer.

4.

That thereupon and thereafter these defendants duly incorporated themselves under the laws of the Territory of Arizona, as the Sherman, Hardenberg Cattle Company, and thereupon transferred all of said property hereinabove mentioned to the said Sherman, Hardenberg Cattle Company, subject to the payment of the two $12,500 notes to the said plaintiff herein and the mortgage securing the same; and thereupon the said corporation agreed to pay, satisfy and discharge said notes according to the tenor and effect thereof.

11

That the said defendants were during all of the times hereinafter mentioned, the only stockholders in said corporation, and that they owned the entire stock of said corporation.

5.

That the said corporation, the Sherman, Hardenberg Cattle Company, neglected and refused to pay off, satisfy or discharge said notes or any part thereof. That this defendant paid the interest on said notes maturing on the first day of October, 1890, 1891, 1892, and 1893, amounting to $8,000.00.

6.

That on or about the first day of October, 1895, the Sherman Hardenberg Cattle Company entered into a contract and agreement with this plaintiff to turn over to him all the property on the said Sun Flower range, consisting of cattle, horses and mules branded with either of the following brands, to wit: Diamond brand, or the H. B. brand; also the wagons, mowing machines, farming implements and camp outfit and everything pertaining to or used by the

said company, together with all other personal property of
12 the said company, including what was known as the Desert Wells, in Maricopa county, about 16 miles east of Mesa, in consideration that the said plaintiff herein should cancel said mortgage and deliver up said notes, to wit: the two $12,500 notes aforesaid, as paid, satisfied and discharged.

That after the signing of said agreement, the said plaintiff herein, took possession of all of said property, but has utterly refused and neglected to satisfy or discharge said notes or either of them and he has utterly refused and neglected to satisfy and discharge said mortgage or any part thereof.

7.

This defendant further alleges, that the note set out in the complaint of the plaintiff herein, is one of the notes mentioned and described in said contract as aforesaid, and that this plaintiff alleges that no part of either of said notes have been paid, satisfied or discharged, and the said plaintiff, as this defendant is informed and verily believes to be true, now holds both of said notes, and that the same are past due, with the interest thereon, and that the mortgage still remains unsatisfied of record in the office of the county recorder of Maricopa county.

8.

This defendant alleges, further, that in addition to paying the $10,000.00 paid at the date of said purchase, and paying the $8,000.00 interest to the said plaintiff herein, that he expended and paid out for the benefit of the said Sherman, Hardenberg Cattle Company, large sums of money, to *with* the sum of $10,000.00
13 in addition to any and all moneys received by him from said corporation, and that the same was paid for taxes and improvements on said company's property.

9.

Defendant further alleges that the said plaintiff herein, after taking possession of all the property of said corporation, proceeded to manage and operate the same, and from time to time sell off the cattle on said range, and as this defendant is informed and verily believes to be true, said plaintiff has sold off from said range between three and five thousand head of cattle turned over to him by the Sherman, Hardenberg Cattle Company as aforesaid, and that he has received therefor the sum of at least $50,000.00; and that in addition thereto the increase on said range from the cattle obtained by the said plaintiff from the said Sherman, Hardenberg Cattle Company as aforesaid, amount to between three and four thousand head in addition to the cattle being so sold as aforesaid. That in addition to the cattle sold by the said plaintiff, the said plaintiff has sold other property received from the said Sherman, Hardenberg Cattle Company, to wit, the Desert Wells and machinery, amounting at least to the sum of fifteen hundred dollars. That this defendant is unable to state more accurately the amount of cattle or

the proceeds derived from the same that has been obtained by the said plaintiff from the sale and disposition thereof, but alleges upon information and belief, that the said plaintiff has sold sufficient cattle and property derived from the said Sherman, Hardenberg Cattle Company as aforesaid, after paying all his expenses incurred in operating and managing and caring for the same to at least pay off, satisfy and discharge the notes and mortgages hereinbefore mentioned.

14

10.

And this defendant further alleges, that if upon an accounting by the said plaintiff which shall be made properly to the court that the said plaintiff has not received from the sale of said cattle and property, after paying all of his expenses, sufficient to pay off, satisfy and discharge said notes and mortgage, that this defendant is ready and willing to pay the plaintiff any balance that may be due him thereon.

11.

That the said defendant, David Hardenberg, has long prior to the commencement of this action sold and transferred to this defendant all his right, title and interest in and to the Sherman Hardenberg Cattle Company, and that the said Sherman Hardenberg Cattle Company has also transferred to this defendant all of its right, title and interest in and to said property, and that this defendant is now, and was at the time of the commencement of action, the only equitable owner of the right of redemption of said property.

Wherefore this defendant prays the judgment of this court that he be allowed to redeem said mortgaged property and the whole thereof, upon paying to the plaintiff herein the amount due upon said notes and mortgages aforesaid after deducting the amount, on a fair accounting by the said plaintiff, that shall be made to appear that he has received from the sale of said cattle and property so received by him from the Sherman, Hardenberg Cattle Company after paying all costs and expenses in managing and handling the same. And that if it shall be made to appear that the said plaintiff has in his hands moneys or property in excess of the amount necessary to pay off, satisfy and discharge said notes and mortgages aforesaid after deducting the costs and expenses of operating said property, then that the said plaintiff be required to pay to this defendant any such excess that may still be found remaining in his hands or under his control.

15

And that upon payment by the said defendant of any balance that may be due on said note and mortgage, that the said plaintiff be required to turn over to this defendant the said Sun Flower cattle range together with all cattle thereon, and also all other property, including horses, machinery and other property derived by the said plaintiff from the said Sherman Hardenberg Cattle Com-

pany, and for such other and further relief as to the court may seem equitable and just in the premises.

C. F. AINSWORTH,
Attorney for M. H. Sherman.

16 EXHIBIT "A."

Know all men by these presents, that I, David Hardenberg, residing in the county of Maricopa in the Territory of Arizona, party of the first part, being justly indebted to John M. Ward, now residing in the county of Maricopa aforesaid, party of the second part, in the sum of twenty-five thousand dollars which is hereby confessed and acknowledged have for the purpose of securing the payment of said debt, granted, bargained, sold and mortgaged and by these presents do grant, bargain sell and mortgage unto the said party of the second part and to his heirs and assigns forever, all that certain real and personal property situated in the county of Maricopa and Territory of Arizona and described as follows, to wit: All my right, title and interest which I may now own or may hereafter acquire in and to that certain tract of land known and called the Sun Flower cattle range in the Prescott land district and heretofore occupied by the said John M. Ward and by him sold and transferred to me, together with the diamond (◇) cattle brand heretofore owned by the said John M. Ward and by him transferred and sold to me, also the Hardenberg cattle brand known and described as HB together with all the cattle now on said Sun Flower range and Verde range branded with either of said brands, or which shall hereafter be owned on said Sun Flower range or in the Territory of Arizona by me or my assigns branded with either of said brands during the continuance of this mortgage, except as hereinafter provided.

17 Also the horses now on said Sun Flower cattle range being twenty-five in number. It being expressly understood that the party of the first part may from time to time dispose of the present horses on said range provided he keeps at least twenty-five in number of an equal amount in value on the range to which this mortgage shall apply, and that all the steers now on said cattle ranges or which may hereafter be owned on the same shall be exempt from the provisions of this mortgage as included herein, and that the party of the first part or his assigns shall have exempt from the provisions of this mortgage and which are not included herein, fifty head of cows per year to be selected by the party of the first part or his assigns at such times as he or they may desire. All of said property being now in possession of said first party in the county and Territory aforesaid.

To have and to hold all and singular the real and personal property aforesaid forever, provided always and these presents are upon the express condition: That if the said party of the first part his heirs — assigns shall pay or cause to be paid unto the said party of the second part *her* heirs or assigns the sum of twenty-five thousand dollars and interest thereon from October 1st, A. D. 1889 at the

rate of eight per cent. per annum, interest payable annually according to the conditions of two promissory notes executed by David Hardenberg payable to the order of John M. Ward payable at the office of C. F. Ainsworth in Phœnix, A. T. viz:
$12,500.00 dated Aug. 23rd, '89, due Oct. 1, 1894, with
18 interest thereon at 8% per annum until paid from October
1st, 1889, interest payable annually with the right to pay the whole or any part of said note at any time. $12,500.00 dated August 23rd, 1889, due October 1st, 1897, with interest thereon from October 1st, 1889, at the rate of 8% per annum until paid, interest payable annually with the right to pay the whole or any part of said note at any time. Then these presents to be void and of no effect. Provided further that the said party of the first part or his assigns may sell the cattle or any number thereof covered by the provisions of this mortgage at any time, by applying the proceeds thereof to the payment of the principal of either or both of the aforesaid notes and upon such application the said John M. Ward or his executors or assigns shall release to the party of the first part or his assigns the cattle so sold provided said cattle shall not be sold for less than twelve dollars per head, and it is provided further that the party of the first part and his assigns shall during the continuance of this mor tgage continue hereafter exclusively the diamond brand on said ranges. But if default shall be made in the payment of said sum of money either principal or interest at the time when the same shall become due and payable or if the party of the first part or his assigns shall violate any of the provisions of this mortgage then thereupon and thereafter it shall be lawful and the said party of the first part hereby authorizes the said party
of the second part his heirs or assigns or his or their
19 authorized agent to take said property wherever the same
may be found and sell and dispose of the same and all equity of redemption therein at public auction after giving twenty days' notice of said sale in some newspaper published in the county and upon said sale convey to the purchaser thereof all the right, title and interest of the party of the first part or his assigns in and to the property so sold retaining such amount from the proceeds of such sale as shall pay the aforesaid notes and interest costs and expenses and an attorney fee of five per cent. for foreclosing the same, provided that no more property shall be sold than sufficient to pay the same.

And as long as the conditions of this mortgage are fulfilled the said party of the first part or his assigns are to remain in the peaceful possession of said property.

In witness whereof, the said party of the first part has hereunto set his hand and seal this 23rd day of August, A. D. 1889.

(Signed) DAVID HARDENBURG. [SEAL.]

In the presence of

C. F. AINSWORTH.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

David Hardenburg and John M. Ward each being severally and duly sworn on oath each for himself, deposes and says that he David Hardenburg is the mortgagor who executed the foregoing mortgage, and that he John M. Ward is the mortgagee in said
20 mortgage described and that said mortgage is *bona fide* and made without any design to defraud or delay creditors.

(Signed) DAVID HARDENBURG.
" JOHN M. WARD.

Subscribed and sworn to before me, this 24th day of August, A. D. 1889.

(Signed) C. F. AINSWORTH,
[SEAL.] *Notary Public.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, C. F. Ainsworth, a notary public in and for said county of Maricopa, on this day personally appeared David Hardenburg known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 24th day of August A. D. 1889.

(Signed) C. F. AINSWORTH,
[SEAL.] *Notary Public, Arizona.*

Filed and recorded at request of John M. Ward August 26th, 1889, at 4.30 o'clock p. m.

(Signed) NERI OSBORN,
County Recorder,
By C. B. MING, *Deputy.*

(Endorsed:) No. 2195. In dist. court 3rd jud. dist. Territory of Arizona, in and for Maricopa county. J. M. Ward, plaintiff *vs.* David Hardenburg and Moses H. Sherman, defendant. Answer and counter-claim of M. H. Sherman. Filed this 16 day of May, A. D. 1899 4.35 p. m. W. C. Foster, clerk. Service of a
21 copy hereof acknowledged this May 16th 1899. —— ——, attorney for plaintiff.

In the District Court of the Third Judicial District, Territory of Arizona, in and for Maricopa County.

J. M. WARD, Plaintiff,
vs.
DAVID HARDINBURG and MOSES H. SHERMAN, Defendants.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona to David Hardenburg and Moses H. Sherman, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the district court of
22 the third judicial district of the Territory of Arizona, in and for Maricopa county, this 6th day of May, A. D. 1899.

W. C. FOSTER,
[SEAL.] *Clerk of said District Court.*

OFFICE OF THE SHERIFF, }
County of Maricopa, } *ss:*

I hereby certify that I received the within summons on the 6th day of May A. D., 1899, at the hour 11.35 a. m., and personally served the same on the 6th day of May A. D., 1899 on Moses H. Sherman, being one of the defendants named in said summons, by delivering to him in the city of Phœnix, county of Maricopa, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons and that I cannot find David Hardinburg in Maricopa county nor in Arizona Territory.

Dated this 18th day of September A. D., 1899.

Fees.

Service	$1.50
Copies	.60
Travel miles	.30
Total	$2.40

D. L. MURRAY, *Sheriff,*
By J. E. BOYD,
Deputy Sheriff.

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Territory of Arizona. J. M. Ward, plaintiff, *vs.* David Hardinburg, Moses H. Sherman, defendant-. Summons. Filed Sept. 18, 1899. W. C. Foster, clerk.

23 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

To J. H. Kibbey, Phœnix, Arizona, attorney for the plaintiff in the above-entitled action:

You are hereby notified to produce at the trial of this action, in the court aforesaid, those two certain promissory notes, bearing date August 23, 1889, each for the sum of $12,500 being due, respectively, the first day of October, 1894, and the first day of October, 1897, each of said notes being payable to the order of J. M. Ward, the plaintiff herein, and signed by David Hardenberg, and endorsed upon the back thereof, payment guaranteed by M. H. Sherman; both of which notes bear interest at the rate of 8 per cent. per annum from date thereof until paid, and both of which are now in the possession of the plaintiff and his attorney. And in case you fail to produce the same, upon the trial of said action, as herein requested, the defendant, M. H. Sherman, will offer parol testimony as to the contents of said notes.

Yours respectfully, C. F. AINSWORTH,
Attorney for Defendant M. H. Sherman.

24 (Endorsed:) No. 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. J. M. Ward, plaintiff, *vs.* David Hardenburg, Moses H. Sherman, def'ts. Notice to produce notes. Filed Nov. 11th, 1899, at 2.15 o'clock p. m. W. C. Foster, clerk.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
HARDENBURG CATTLE CO. ET AL., Defendant-. } Subpœna.

The Territory of Arizona sends greeting to James Keating:

You are commanded that all and singular business and excuses being laid aside, you appear and attend before our district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, at a term of said court to be held at the courthouse, in said county, on the 14th day of Nov. A. D. 1899, at 9.30 o'clock a. m. then and there to testify in the above-entitled action now pending in said district court, on the part of the plaintiff, and

disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of one hundred dollars and all damages which may be sustained by your failure to attend.

Given under my hand this 11 day of November, A. D., 1899.

[SEAL.]

W. C. FOSTER,
Clerk of said District Court,
By L. B. STREET,
Deputy Clerk.

25 SHERIFF'S OFFICE,
County of Maricopa, } ss:

I hereby certify that I served the within subpœna by reading the same to each of the following persons named therein, personally, on the 13 day of November, A. D. 1899, at the county of Maricopa, to wit: James Keating who demanded and received fees $17.00.

Dated this 13 day of Nov. A. D., 1899.

Service	$ .50
Mileage	15.00
	$15.50
Wit. fees	17.00
	$32.50

D. L. MURRAY, *Sheriff,*
By WM. J. MURRAY,
Deputy Sheriff.

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Arizona Territory. J. M. Ward, plaintiff, *vs.* Hardenburg & Sherman, defendant-. Subpœna. Filed Nov. 14, 1899. W. C. Foster, clerk.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG, Defendant. } Subpœna.

The Territory of Arizona sends greeting to Jos. Monihon:

You are commanded that all and singular business and excuses being laid aside, you appear and attend as a witness before our district court of the third judicial district of the Territory of
26 Arizona, in and for the county of Maricopa, at a term of said court to be held at the court-house, in said county, on the 14 day of Nov., A. D. 1899, forthwith, then and there to testify in the above-entitled action now pending in said district court, on the part of the def't-, and disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of

one hundred dollars and all damages which may be sustained by your failure to attend.

Given under my hand this 14 day of Nov., A. D. 1899.

W. C. FOSTER,
Clerk of said District Court.

[SEAL.]

SHERIFF'S OFFICE,
County of Maricopa, } ss:

I hereby certify that I served the within subpœna by reading the same to each of the following persons named therein, personally, on the 14th day of November, A. D., 1899, at the county of Maricopa, to wit: Jos. Monihon who demanded and received fees, $2.30.

Dated this 14th day of November, A. D. 1899.

Fees	$2.30
Service	.50
Mileage	.30
	3.10

D. L. MURRAY, *Sheriff,*
By J. E. BOYD,
Deputy Sheriff.

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Arizona Territory. J. M. Ward, plaintiff, *vs.* David Hardenburg, *et al.*, defendant-. Subpœna. Filed Nov. 14, 1899, W. C. Foster, clerk. C. F. Ainsworth, attorney for d'f'ts.

27 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendant-. } Subpœna.

The Territory of Arizona sends greeting to Leon Bouvier:

You are commanded that all and singular business and excuses being laid aside, you appear and attend as a witness before our district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, at a term of said court to be held at the court-house in said county on the 14 day of Nov. A. D., 1899, at 9.30 o'clock, a. m., then and there to testify in the above-entitled action now pending in said district court, on the part of the plaintiff, and disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of one hundred dollars and all damages which may be sustained by your failure to attend.

Given under my hand this 13 day of Nov. A. D., 1899.

W. C. FOSTER,
Clerk of said District Court.

[SEAL.]

SHERIFF'S OFFICE,
County of Maricopa, } ss:

I hereby certify that I served the within subpœna by reading the same to each of the following persons named therein,
28 personally, on the 13th day of November, A. D., 1899, at the county of Maricopa, to wit: Leon Bouvier, who did not demand fees.
Dated this 13th day of November, A. D., 1899.

Service..... $.50
Mileage..... .30

.80c.

D. L. MURRAY, *Sheriff,*
By J. E. BOYD,
Deputy Sheriff.

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Arizona Territory. J. M. Ward, plaintiff, *vs.* David Hardenburg, *et al.*, defendant-. Subpœna. Filed Nov. 14, 1899. W. C. Foster, clerk. Kibbey & Edwards attorney- for plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendant-. } Subpœna.

The Territory of Arizona sends greeting to Leon Bouvier, John R. Norton, J. H. Johnstone:

You are commanded that all and singular business and excuses being laid aside, you appear and attend as witnesses before our district court of the third judicial district of the Territory of Arizona,
in and for the county of Maricopa, at a term of said court to
29 be held at the court-house, in said county, on the 14 day of Nov. A. D. 1899, at 9.30 o'clock, a. m., then and there to testify in the above-entitled action now pending in said district court, on the part of the def't-, and disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of one hundred dollars and all damages which may be sustained by your failure to attend.
Given under my hand this 13 day of Nov. A. D. 1899.
[SEAL.]

W. C. FOSTER,
Clerk of said District Court.

SHERIFF'S OFFICE,
County of Maricopa, } ss:

I hereby certify that I served the within subpœna by reading the same to each of the following persons named therein, personally,

on the 14th day of November, A. D., 1899, at the county of Maricopa to wit: John R. Norton and Leon Bouvier, who demanded and received fees, $2.30 each.

Dated this 14th day of November A. D., 1899.

Fees	$4.60
Service	1.00
Mileage	.60
	$6.20

D. L. MURRAY, *Sheriff*,
By J. E. BOYD,
Deputy Sheriff.

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Arizona Territory. J. M. Ward, plaintiff, *vs.* David Hardenburg, *et al.*, defendant-. Subpœna. Filed Nov. 14, 1899. W. C. Foster, clerk. C. F. Ainsworth, attorney for def't-.

30 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendants. } Subpœna.

The Territory of Arizona sends greeting to Ramon Ortega:

You are commanded that all and singular business and excuses being laid aside, you appear and attend as witness before our district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, at a term of said court to be held at the court-house, in said county, on the 14 day of Nov'r A. D. 1899, at 9.30 o'clock, a. m. then and there to testify in the above-entitled action now pending in said district court, on the part of the plaintiff, and disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of one hundred dollars and all damages which may be sustained by your failure to attend.

Given under my hand this 14" day of Nov'r A. D., 1899.

[SEAL.]

W. C. FOSTER,
Clerk of said District Court,
By L. B. STREET,
Deputy Clerk.

31 SHERIFF'S OFFICE, *County of Maricopa,* } ss:

I hereby certify that I served the within subpœna by reading the same to each of the following persons named therein, personally, on

the 14th day of November, A. D. 1899, at the county of Maricopa, to wit: Ramon Ortego who demanded and received fees, $2.30.

Dated this 14th day of November, A. D. 1899.

D. L. MURRAY, *Sheriff*,
By W. W. MOORE,
Deputy Sheriff.

Fees	$2.30
Service	.50
Mileage	.30
	$3.10

(Endorsed:) No. 2195. District court, third judicial district, county of Maricopa, Arizona Territory. J. M. Ward, plaintiff, *vs.* David Hardenburg, *et al.*, defendant-. Subpœna. Filed Nov. 14, 1899. W. C. Foster, clerk. Kibbey & Edwards, attorney- for pl't'ff.

P. Ex. A.

$12,500.00. PHŒNIX, A. T., *August* 23*d*, 1889.

On or before October 1st, 1894 for value received I promise to pay to the order of John M. Ward, at the office of C. F. Ainsworth in the city of Phœnix, Arizona, the sum of twelve thousand five hundred dollars with interest thereon from October 1st, A. D. 1889 until paid at the rate of eight per cent. per annum, interest payable annually at the expiration of each year, provided that the whole or any part of this note can be paid at any time.

DAVID HARDENBERG.

32 (Endorsed:) For value received I guarrantee the payment of the within note and hereby waive demand and notice of protest. M. H. Sherman.

San Francisco, Nov. 5, 1890.—Rec. on the within note one thousand dollars, being one year's interest to Oct. first, 1890.

J. M. WARD.

Oroville, Nov. 30", 1891.—Rec'd on the within note $1000—one thousand dollars, being interest to Oct. 1", 1891.

J. M. WARD.

Oroville, Sept. 27th.—Received on the within note $1000, one thousand dollars, being interest to October 1st, 1892.

Oroville, Oct. 10.—Received on the within note $1000, one thousand dollars being interest to October 1st, 1893.

2195. Plaintiff's Exhibit A. Filed Nov r 14, 1899. W. C. Foster, clerk, by L. B. Street, deputy.

P. Ex. B.

This article of agreement made and entered into this twelfth day of September, A. D., 1894, by and between J. M. Ward of the county

of Butte, in the State of California, party of the first part, and The Sherman Hardenburg Cattle Company, a corporation of Maricopa county, Arizona Territory, party of the second part,

Witnesseth: The said part- of the second part is indebted to the said party of the first part in the sum of $27,000 as follows,
33 to wit: $12,500 principal due on a certain promissory note October 1st, 1894; $2,000 yearly interest on $25,000 due October 1st, 1894; also $12,500 due on a certain promissory note on October 1st, 1897; and

Whereas the said party of the second part is unable to pay to said party of the first part the said sum of $14,500 due on October 1st, 1894, and has notified said party of the first part that it will be unable to pay said sum at said time and

Whereas said party of the second part desires to deliver up and turn over to said party of the first part all of the property heretofore purchased by one David Hardenburg of the party of the first part, and for which said notes were given as a part of the purchase-money.

Now therefore, in consideration of the promises and agreements of said party of the first part, the said party of the second part hereby agrees to and with said party of the first part to transfer and convey by proper deeds of conveyance and bills of sale all of the real and personal property heretofore purchased by the said David Hardenburg of the said party of the first part; also all personal and real property owned by the said party of the second part in the Territory of Arizona, in whomsoever's name the same may now stand, to said party of the first part, and more particularly described as follows, to wit: The Sunflower cattle range in Maricopa county, Arizona Territory; all cattle, horses, mules or burros branded with either of the following brands: Diamond brand, thus: ◇; H. B. brand, thus:
34 HB; also all wagons, mowing machines, farming implements and camp outfit, and everything pertaining to or used by said Sherman Hardenburg Cattle Company, excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman Herdenburg Cattle Company prior or to September 1st, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1st, 1894, shall be accounted for by the party of the second part to said party of the first part.

That in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to said David Hardenburg and one M. H. Sherman two promissory notes, each for $12,500, one of which matures on October 1st, 1894, and one of which matures on October 1st, 1897, heretofore executed by the said Hardenburg and Sherman to the party of the first part; also to release the said Hardenburg and Sherman from the payment of all

interest due thereon, and to cancel and discharge a certain chattel mortgage executed by the said David Hardenburg to the said party of the first part, for the purpose of securing the payment of said notes, which said mortgage is now on file and of record in the
35 office of the county recorder of Maricopa county, in the Territory of Arizona.

In witness whereof, the said party of the second part, The Sherman, Hardenburg Cattle Company, has executed these presents in its corporate name, by its president and the said party of the first part has executed these presents the day and year first above written.

SHERMAN, HARDENBURG CATTLE COMPANY,
By M. H. SHERMAN, *President.*

(Endorsed:) 2195. Pl't'ff's Exhibit "B." Filed May 23, '99 W. C. Foster, clerk. By L. B. Street, deputy.

36 (DEFENDANTS' EXHIBIT 1.)

$12,500.00. PHŒNIX, A. T., *August* 23*d*, 1889.

On or before October 1st, 1897 for value received, I promise to pay to the order of John M. Ward at the office of C. F. Ainsworth in the city of Phœnix, Arizona the sum of twelve thousand five hundred dollars with interest thereon from October 1st, A. D. 1889 until paid at the rate of eight per cent. per annum, interest payable annually, at the expiration of each year, provided that the whole or any part of this note can be paid at any time.

DAVID HARDENBERG.

(Endorsed:) For value received I guarrantee the payment of the within note and hereby waive demand and notice of protest. M. H. Sherman.

San Francisco, Nov. 5, 1890.—Rec. on the within note one thousand dollars, being one year's interest to Oct. first 1890.

J. M. WARD.

Oroville Nov. 30", 1891.—Received on the within $1000—one thousand dollars, being interest to October 1", 1891.

J. M. WARD.

Oroville, Sept. 27th.—Received on the within $1000. one thousand dollars, being interest to Oct. 1st, 1892.

Received of M. H. Sherman, Nov. 24/93 five hundred dollars to apply on interest, receipt given to M. H. Sherman.

J. M. WARD.

Received of C. F. Ainsworth May 2/94 five hundred dollars in full for balance of interest on note to October 1st, 1893.

J. M. WARD.

37 2195. Defendants' Ex. 1. Filed Nov'r 14, '99. W. C. Foster, clerk. By L. B. Street.

D. Ex. 2.

Bill of Sale.

Know all men by these presents: that the Sherman Hardenburg Cattle Company, a corporation of Phœnix, Maricopa county, Arizona Territory, the party of the first part, for and in consideration of the sum of one dollar and other valuable considerations to it in hand paid by J. M. Ward the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns the following property in Maricopa county, Arizona and located at what is known and called Kellogg Wells in said county, to wit: One Worthington steam pump with one upright boiler 72 inches high by 30 inches in diameter, and all steam pipes connected or attached thereto, one steel whim complete with cable, self-dumping bucket and all other attachments and fixtures belonging to the same, one large 5,000-gallon wooden water tank, six large water troughs, five corrals, one farm-house about 18 by 20 feet together with stove, cooking utensils and furniture used in same, one shed barn for horses, one granery; also all other personal property owned by the Sherman Hardenburg Cattle Company and used on or in connection with said well. To have and to hold the same to the said party of the second part, his
38 executors, administrators and assigns forever. And the said Sherman Hardenburg Cattle Company covenant and agree, to and with the said party of the second part his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels, hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same.

In witness whereof the Sherman Hardenburg Cattle Company has caused these presents to be executed in its corporate name by its secretary this eighth day of October, 1894.

[SEAL.] (Signed) THE SHERMAN HERDENBURG CATTLE COMPANY,
By C. F. AINSWORTH, [SEAL.]
Its Secretary.

Filed and recorded at request of Huse Ward Oct. 9th, 1894, at 7.50 p. m.

(Signed) NERI OSBORN,
County Recorder,
By H. C. MEADOR, *Deputy.*

(Endorsed:) 2195. Defendants' Exhibit No. 2. Filed Nov'r 14", 1899. W. C. Foster, clerk. By L. B. Street, deputy.

39 D. Ex. "3."

Sherman-Hardenberg Cattle Company.

M. H. Sherman, president; David Hardenberg, vice-pres. & mgr.; C. F. Ainsworth, secretary; the Valley Bank, treasurer.

PHŒNIX, ARIZONA, *Sept. 29th*, 1894.

To J. M. Ward, Esq.:

The Sherman-Hardenberg Cattle Company hereby authorizes you to enter upon and take possession of all the property belonging to the Sherman-Hardenberg Cattle Company, in accordance with and as described in that certain contract entered into by and between the Sherman-Hardenberg Cattle Company and yourself bearing date on the 12th day of September A. D. 1894.

That on receipt of said property you are to turn over to the Sherman-Hardenberg Cattle Company at the office of C. F. Ainsworth in Phœnix, Arizona the notes described in the contract, and also to cancel the chattel mortgage held by you on the property therein referred to.

THE SHERMAN-HARDENBERG CATTLE CO.,
By C. F. AINSWORTH, *Its Secretary.*

I hereby authorize H. C. Ward as my agent to rec. the above-described property for me.

J. M. WARD.

(Endorsed:) 2195. Def'd'ts' Exhibit No. "3." Filed Nov'r 14, 1899. W. C. Foster, clerk. By L. B. Street, deputy.

40 D. Ex. "4."

Sunflower Ranch Statement.

I hereby certify that the following statement regarding the "Sunflower ranch" situated in Maricopa county, Arizona, and of the stock and improvements on said ranch is a true and full statement.

The ranch contains 480 acres of patented land, I use about 20 miles by 16 miles on range for my stock outside of my patented land. There is plenty of water on the 480 acres, and there is plenty of water on the outside Government land. I have about two thousand (2000) cattle on the range now. I have sold April 17th ninety-nine (99) head of which there were six one-year old, for which I obtained $15 each, six old cows, for which I obtained sixteen dollars ($16) each, two bulls for which I obtained sixteen dollars ($16) each; and fifty-two two-year-olds for which I obtained eighteen dollars ($18) each; and thirty-three, three-year-olds for which I obtained twenty-two dollars ($22.00) each. I am now selecting one hundred head more which I have sold at the same

figure to John Norton. My ranch will carry five thousand head of cattle. I have owned it for seventeen (17) years.

My stock are being bred up to short horns. I have been breeding them up for fourteen (14) years.

Purchasers would have to pay from $13 to $18 per head for stock enough to stock the ranch up to its fair carrying capacity of 5000 head. I have one hundred (100) acres fenced for farming purposes with wire. I also have two thousand acres fenced on
41 three sides up to the mountains for horse pasture. I have about sixty head of horses, work-mules and pack animals also wagons, mowing machine and farming implements. There are four houses on the range, and ten big corrals—two of these corrals and two houses are on the 480 acres of patented lands. I also have 160 acres of land owned by my son who will prove up soon, that I will include in the ranch. I also have a soldier's warrant for 160 acres of land that I will include.

I put nine hundred (900) head on the ranch seventeen (17) years ago. I put in five hundred and fifty (550) head of cattle nine years ago obtained through the Sherman Hardenberg Company. I sold sixteen hundred (1600) head between 1894 and 1897, and in 1898 I sold twenty-four hundred (2400) head. I obtained $14.50 each for the twenty-four hundred (2400) head and counted everything that walked. I sold to Crowley Garrett & Co. Midland, Texas. I have never branded less than 1000 head each year and in 1897 I branded twelve hundred and eighty (1280) calves.

It is said to be the safest range and the best breeding range in this county. My price is thirty thousand dollars ($30,000) cash. It costs me about three thousand ($3000) to three thousand two hundred ($3200) per year to run the ranch, this includes all expenses.

In 1898 I sold 604 calves and branded 550.

I sold seven thousand ($7000) worth of cattle in 1895 and $7000 worth in 1896, and $8000 worth in 1897. In 1898 I sold
42 $42300 worth. This last amount was received for twenty-eight hundred and fifty-three head including calves.

J. M. WARD.

Witness:
J. H. SPIRES.

Phœnix, Arizona, April 18, '99.

(Endorsed:) 2195. Defendants' Exhibit No. "4." Filed Nov'r 14th, 1899. W. C. Foster, clerk. By L. B. Street, deputy.

D. Ex. 5.

OROVILLE, *Sept.* 13, '94.

Mr. C. F. Ainsworth:

As you said you had carte-blanch- from W. H. Sherman to dispose of the Sherman Hardenberg Cattle Co. property I have made up my mind to accept your proposition just as you stated everything

land with the titles complete & you can turn the same over to my boy & I will be in Phœnix about the last days of this month.

As ever,

J. M. WARD.

Please answer.

(Endorsed:) 2195. Defendants' Ex. No. "5." Filed Nov'r 14, 1899. W. C. Foster, clerk. By L. B. Street, deputy.

43 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

Comes now the plaintiff in the above-entitled cause and moving the court for a new trial and for grounds therefor says:

I.

That the court erred in admitting the evidence adduced by the defendant.

II.

That the court erred in rejecting evidence offered by the plaintiff.

III.

That the evidence does not sustain the judgment, findings or verdict of the court.

IV.

That the evidence does not sustain the findings of the court.

V.

That the judgment of the court is contrary to the law.

VI.

That the judgment of the court is contrary to the evidence.

KIBBEY & EDWARDS, *For Pl'ff.*

(Endorsed:) 2195. In the district court, third judicial dis-
44 trict, Territory of Arizona, county of Maricopa. J. M. Ward, plaintiff, *vs.* David Hardenburg, *et al.* d'f'ts. Motion for new
trial. Filed Dec. 4, 1899, at 10 o'clock a. m. W. C. Foster, clerk.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG & MOSES H. SHERMAN, Defendants. } Memorandum of Costs and Disbursements.

Sheriff's fees & witness fees paid by sheriff	$9.30
Clerk's fees	10.55
Witness fees	2.00
Reporter's fees	14.80
	$36.65

TERRITORY OF ARIZONA, } ss:
County of Maricopa,

C. F. Ainsworth, being duly sworn deposes and says: That he is one of the attorneys for the def't Moses H. Sherman in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said def't. That the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

C. F. AINSWORTH.

Subscribed and sworn to before me, this 5" day of December, 1899.
[SEAL.] W. C. FOSTER, *Clerk.*

45 (Endorsed:) No. 2195. District court third judicial district, county of Maricopa. J. M. Ward, plaintiff, *vs.* David Hardenburg *et al.*, defendant-. Memorandum of costs and disbursements. Filed Dec. 5, 1899. W. C. Foster, clerk. C. F. Ainsworth, att'y for def't-.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants. } Judgment.

The cause coming on regularly to be heard before the court, without a jury, on November 14th, 1899, before the Honorable Webster Street, presiding judge of said court; upon the complaint of the plaintiff herein, and the answer and counter-claim of the defendant, Moses H. Sherman (the said defendant David Hardenberg not having been served with process and not appearing herein); and the plaintiff having presented his evidence to the court to sustain the allegations of his complaint, and the defendant, Sherman, having presented his evidence to the court to sustain the allegations of his

answer and counter-claim; and thereupon the respective counsel for the parties having presented their arguments to the court, the plaintiff being represented by Joseph H. Kibbey, Esq., and the defendant Sherman by C. F. Ainsworth, Esq. and Frank Cox, Esq.;
and the court having taken the matter under advisement;
46 and having fully and carefully considered the evidence and
the law applicable thereto; and being fully and sufficiently advised in the premises; and having on this 2nd day of December, 1899 rendered, in open court, its findings of fact and conclusions of law, all of which have been reduced to writing and filed herein; now upon motion of C. F. Ainsworth and Frank Cox, attorneys for the defendant Sherman, it is by the court considered, ordered and adjudged:

That the defendant Moses H. Sherman is the owner and entitled to the possession of the Sunflower cattle range in Maricopa county, Arizona, a portion of which is more particularly described as follows, to wit: the northeast quarter of the southwest quarter of section 7, township 6 north, range 9 east; and also to all horses upon said range, also all wagons, saddles, mowing machines and other farming implements used on the said range; together with all cattle branded with either the diamond (◇) brand or the HB brand, which were heretofore turned over to said plaintiff, on or about October 1, 1894, by the Sherman-Hardenberg Cattle Company, except such cattle as said plaintiff has sold and disposed of during the years 1894, 1895, 1896, 1897, 1898, 1899, and accounted for by him upon the trial of this action; and that said defendant Sherman be put into possession forthwith of all of said property.

It is further considered, ordered and adjudged that said defendant Sherman have and recover of said plaintiff, Ward, the sum of
$17,173.50, with interest thereon from the date hereof at the
47 rate of 7 per cent. per annum; together with his costs and
disbursements incurred herein, taxed and allowed at the sum of $36.65 *dollars*.

It is further considered, ordered and adjudged that the two promissory notes for $12,500 each, dated August 23, 1889, and bearing interest at the rate of 8 per cent. per annum, executed by David Hardenberg to John M. Ward and the payment thereof guaranteed by Moses H. Sherman, together with the chattel mortgage executed by David Hardenberg to John M. Ward, of even date therewith, upon the property mentioned and described in said mortgage, to secure the payment of said notes, be and the same are hereby adjudged paid, canceled and discharged.

It is further ordered, considered and adjudged that the defendant M. H. Sherman have execution in accordance with this judgement.

Done in open court this 2nd day of December, 1899, at the hour of 10 o'clock a. m.

By the court:

WEBSTER STREET, *Judge*.

(Endorsed:) 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. John M. Ward, plaintiff, *vs.* Moses H. Sherman & David Hardenberg, def'ts. Ent. Book G, page 19. Judgment for def't Moses H. Sherman. Docketed. Service of copy of within admitted this 4" day of December, 1899. Kibbey, att'y for pl'ff. Filed December 6th, 1899, at 2 o'clock p. m. Dec. 6th, 1899. W. C. Foster, clerk. By L. B. Street, deputy. Book G, page 51, judgments.

48 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. Sherman, Defendants.
} Findings of Fact and Conclusions of Law.

This cause coming on regularly to be heard before the court, on the 14" day of November, 1899, upon the complaint of the plaintiff herein, and the answer and counter-claim of the defendant, Moses H. Sherman (the said defendant David Hardenberg not having been served with process and not appearing herein); and the plaintiff having presented his evidence to support the allegations of the complaint, and the defendant, Sherman, having presented his evidence to support the allegations of his counter-claim; and the plaintiff being represented by Joseph H. Kibbey, Esq., and the defendant, Sherman, being represented by C. F. Ainsworth, Esq., and Frank Cox, Esq.; and the court, after the presentation of the respective counsel and their arguments in support of their respective contentions, having taken the matter under advisement, and being fully and sufficiently advised in the premises, now, on this 2nd day of December, 1899, renders in open court its findings of fact and conclusions of law and judgment.

The court finds as facts established as follows:

1. That the plaintiff, John M. Ward, is a resident of Oro-
49 ville, State of California; and that the defendant, Moses H. Sherman is a resident of Los Angeles, State of California; and that the defendant, David Hardenberg, is a non-resident of the Territory of Arizona, and that he was not served with process and did not appear herein.

2. That heretofore, to wit on or about August 23, 1889, the plaintiff sold to the defendants the Sunflower Cattle Ranch, in Maricopa county, Arizona, together with all the cattle then running on said range branded with the diamond brand, (◇), and together with all the horses on said range, being at that time about thirty (30), also all wagons, saddles, mowing machines and other farming implements, used on said range; together with the southwest quarter of section 7 township 6 north, range 2 east: for the sum of thirty-five thousaad dollars ($35,000). That the title to all of said property was taken in the name of defendant Hardenberg. That ten thousand dollars ($10,000) was paid down upon such purchase by the

defendant Sherman, and the balance of the purchase-money was secured by two promissory notes for twelve thousand five hundred dollars ($12,500) each, bearing date August 23, 1889, one of said notes due on or before October first 1894, and the other on or before October 1st, 1897; both notes bearing interest at the rate of eight (8) per cent. per annum, interest payable annually. That these notes were executed by defendant Hardenberg, and their payment guaranteed, at the time of their execution, by defendant Sherman; and that
50 in order to secure the payment of these notes the defendant Hardenberg executed and delivered to the plaintiff a chattel mortgage upon all of the cattle then purchased from the plaintiff by said defendants, as aforesaid; also all the cattle that was owned by the said Hardenberg branded HB; together with all other cattle on the Sunflower range or the Verde range, branded with the diamond brand or the HB brand; together with all horses; the said mortgage covered also the increase from said cattle during the continuance thereof.

3. That afterwards the said defendants Sherman and Hardenberg incorporated themselves into a corporation under the laws of the Territory of Arizona, known as the Sherman-Hardenberg Cattle Company; said defendants being the only stockholders in said company. That all of the property aforesaid was transferred to this company, subject to the mortgage aforesaid.

4. That this company neglected to pay the interest upon the two notes aforesaid, for the years 1890, 1891, 1892 and 1893, and thereupon the defendant Sherman paid the same, amounting to the sum of eight thousand dollars ($8,000).

5. That during the month of September, 1894, and before the maturity of the first note, the Sherman-Hardenberg Cattle Company attempted to make a settlement with the plaintiff, by agreeing to turn over to him the Sunflower range, all the cattle then on the range, also the desert wells, and other property which it had, which was not included in the mortgage, on condition that
51 said plaintiff turn over and deliver up the two notes aforesaid with the interest thereon, and cancel and satisfy the mortgage securing the same.

6. That this contract was never carried out on the part of the plaintiff; but that acting under it he took possession of all the property of the Sherman-Hardenberg Cattle Company, as aforesaid, on or about October 1st, 1894; but never turned over, delivered or cancelled said notes, or either of them, or satisfied or discharged the chattel mortgage securing the same. And that, on the contrary, he brought suit on one of said notes for the collection of a portion that he claimed to be due thereon. At the time he brought this suit on the note maturing October 1, 1894, the other note had not matured.

7. That the defendant Sherman became the owner of all the equity of redemption in the property formerly owned by the plaintiff and afterward by the Sherman-Hardenberg Cattle Company, subject however to the notes and mortgage held by said plaintiff.

8. That as soon as defendant Sherman was served with process in this action, he filed his answer and counter-claim, setting up that he

was the owner of this property, subject to the notes and mortgage thereon, with interest thereon, and seeking an accounting from the plaintiff, and offering to pay any balance that might be found due on said notes and mortgage to said plaintiff.

9. That the defendant Sherman has expended and laid
52 out of his own money, upon said cattle range, from the time he became interested therein in 1889 down to the present time the following amounts: Ten thousand dollars ($10,000) cash at the time of the purchase; eight thousand dollars ($8,000) interest as aforesaid; ten thousand dollars ($10,000) paid for taxes and other expenses in managing and running the said range.

10. That the title to said property so turned over to said plaintiff, on October 1st, 1894, ever since that date, and at the present time, has been and is in the defendant Sherman, subject however to the payment of the two notes for twelve thousand five hundred dollars each ($12,500), with interest thereon as aforesaid, and the costs and expenses of operating said range by the plaintiff, since he took possession thereof.

11. That upon the trial of this action, the said plaintiff upon notice from defendant Sherman, produced both of said notes in court; both of which were unpaid, and had no endorsements thereon, except the interest paid thereon to October 1, 1893; and that said mortgage securing the same was produced in open court upon said trial, the same being unsatisfied and uncanceled.

12. That the plaintiff held said property as a trustee for the benefit of defendant Sherman, and that he is accountable for the property by him sold while in possession, to the said defendant Sherman.

13. That the said plaintiff on his own statement made in court over his signature and his evidence given in this trial should
53 be charged as follows:

Sales of cattle from said range in	1895	$7,000.
" " "	1896	7,000.
" " "	1897	8,000.
" " "	1898	42,300.
" " "	1899	6,206.50
Total sales of cattle		$70,506.50

14. That the said plaintiff should be credited on said account, as follows:

Principal of said notes	$25,000.
Interest thereon from October 1, 1893 to date, being six years and two months, at eight per cent. per annum	12,333.
Expenses by him incurred and paid out in running and managing said ranch for 1895	3,200.
" " " 1896	3,200.
" " " 1897	3,200.
" " " 1898	3,200.
" " " 1899	3,200.
Total to be credited	$53,333.

15. That this amount with which the plaintiff is to be credited deducted from the amount received by him from the sales of cattle, leaves a balance of $17,173.50, due from said plaintiff to the defendant Sherman.

As conclusions of law, the court finds as follows:

1. That the said plaintiff is now, and has ever since the time he took possession of the mortgaged property as aforesaid, been a trustee of said property for the benefit of the said defendant Sherman, the assignee of the mortgagor of said property.

2. That said plaintiff is to be charged on his account with the proceeds derived from said property during the time he has been trustee as aforesaid, the sum of $70,506.50.

54 3. That said plaintiff is to be credited with the amount of said promissory notes and interest thereon from October 1, 1893; together with the costs of running and operating said ranch during the time he has been in possession thereof, as trustee, as aforesaid; in all the sum of $53,333.

4. That said notes and mortgage shall be delivered up by the plaintiff canceled and discharged.

5. That defendant Sherman is entitled to a judgment against the plaintiff, John M. Ward; that he, said defendant Sherman, is the owner and entitled to possession of the Sunflower range, together with all the cattle which were running thereon and turned over to said plaintiff on or before October 1, 1894, together with all horses and personal property turned over to the plaintiff, less the amount which he has sold and disposed of, as herein accounted for.

6. And that the defendant Sherman is entitled to a personal judgement against said plaintiff, John M. Ward, in the sum of $17,173.50, with interest thereon from date at the rate of seven per cent. per annum, together with his costs and disbursements incurred herein. And that judgment be rendered accordingly.

Done in open court this 2nd day of December, 1899.

WEBSTER STREET, *Judge.*

(Endorsed:) 2195. In the district court, third judicial district Territory of Arizona, county of Maricopa. John M. Ward, pl'ff *vs.* Moses H. Sherman & David Hardenberg, def't. Findings of
55 fact & conclusions of law. Service of the within copy admitted this 4" day of December, 1899. Kibbey, att'y for pl'ff. Filed Dec. 6th, 1899, at 2 o'clock p. m. W. C. Foster, clerk third judicial district court of Arizona. By L. B. Street, deputy cl'k.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

Know all men by these presents, that we John M. Ward, as principal, Charles Goldman and Frank Criswell, as sureties, are bound unto Moses H. Sherman in the sum of one thousand dollars for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs and executors.

Signed and sealed this 3rd day of January, 1900.

The condition of the above obligation is such that whereas: the above-named Moses H. Sherman did on the 2nd day of December 1899 recover judgment in the above-named court in a cause in said court then pending entitled John M. Ward, as plaintiff, and David Hardenberg and Moses H. Sherman as defendants, wherein it was adjudged that the said Moses H. Sherman is the owner of and entitled to the possession of the Sun Flower cattle range, in Maricopa county, Arizona, and also of all the horses upon said range and also wagons, saddles, mowing machines and other farming implements used on said range, together with all the cattle branded, either the diamond (◇) brand or the HB brand and that said Sherman be
56 put in possession thereof and that the said Sherman do have and recover of the said Ward the sum of seventeen thousand one hundred and seventy-three dollars and fifty cents and his costs, and further that two certain promissory notes mentioned in the answer of the said defendant Sherman, aggregating in amount to twenty-five thousand dollars and a chattel mortgage executed to secure the same all executed by David Hardenberg to John M. Ward be adjudged paid, cancelled and discharged.

And whereas the said John M. Ward has appealed to the supreme court of the Territory of Arizona from said judgment.

And whereas the clerk of the above-named district court has fixed the probable amount of the costs of the suit of both the appellate court and the court below at five hundred dollars.

Now therefore if the said John M. Ward shall prosecute his said appeal with effect and shall pay all the costs which have accrued in the court below or which may accrue in the appellate court, then this obligation shall be void otherwise to be and remain in full force and effect.

J. M. WARD.
CHAS. GOLDMAN.
F. L. CRISWELL.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Charles Goldman and Frank Criswell the sureties above named each being duly sworn upon his oath, each for himself says
57 that he is worth the sum of one thousand dollars over and above his just debts and liabilities exclusive of property exempt from execution.

CHAS. GOLDMAN.
F. L. CRISWELL.

Subscribed and sworn to before me this 3rd day of January, 1900. My commission expires March 4th, 1900.

[SEAL.] A. J. EDWARDS,
Notary Public.

(Endorsed:) 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. J. M. Ward, pl intiff, *vs.*

David Hardenburg and Moses H. Sherman, def'ts. Appeal bond. Approved and filed Jan'y 11th, 1900, at 1.35 o'clock p. m. W. C. Foster, clerk.

58 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendant-.

Comes now the plaintiff and moving the court to affix the amount of an appeal bond to suspend execution of the judgment in this cause represents that the plaintiff has complied with that part of the judgment relating to the possession of property, by the delivery of the possession thereof to the defendant Sherman. That he has heretofore given a cost bond upon appeal in this cause.

Wherefore the plaintiff prays that the court will fix the bond at $34,347.00 that being double the amount of the money judgment rendered, to be given in addition to the cost bond heretofore given.

——— ———, *Attorney for Plaintiff.*
KIBBEY & EDWARDS, *For Pl'ff.*

I consent to this order if made.

C. F. AINSWORTH,
Attorney for Defendant Sherman.

The above motion granted and so ordered.

WEBSTER STREET, *Judge.*

(Endorsed :) No. 2195. In the district court third judicial district county of Maricopa, Territory of Arizona. J. M. Ward, plaintiff, *vs.* David Hardenburg, Moses H. Sherman, defendant-. Motion & order fixing bond. Filed January 31st, 1900. W. C. Foster, clerk. By L. B. Street, deputy clerk.

59 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
M. H. SHERMAN and DAVID HARDENBERG, Defendants.

Comes now the defendant, M. H. Sherman, in the above-entitled action, by his attorney, C. F. Ainsworth, and objects to and refuses to accept the bond for appeal filed herein by the plaintiff, John M. Ward, for the reason that he objects to the sufficiency of the sureties on said bond, and particularly to the sufficiency of F. L. Creswell, one of said sureties.

C. F. AINSWORTH,
Attorney for Defendant M. H. Sherman.

(Endorsed :) 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. John M. Ward, *vs.* M.

H. Sherman & David Hardenberg. Def't's objections to bond on appeal filed by plaintiff. Filed Feb'y 1st, 1900, at 2 o'clock p. m. W. C. Foster, clerk. By L. B. Street, deputy. C. F. Ainsworth att'y for def't Sherman.

60 Know all men by these presents, that we, John M. Ward as principal and Charles Goldman, F. L. Creswell, Simon Novinger, Leo. Goldman and J. R. Norton and James E. Bark as sureties, are bound unto Moses H. Sherman in the following penal sums, the said John M. Ward in the sum of thirty-four thousand three hundred and forty-seven dollars; the said Charles Goldman in the penal sum of twenty thousand dollars; the said F. L. Creswell in the sum of ten thousand dollars; the said Simon Novinger in the penal sum of ten thousand dollars; the said Leo. Goldman in the penal sum of ten thousand dollars; the said J. R. Norton in the penal sum of ten thousand dollars and the said James E. Bark in the penal sum of ten thousand dollars, for the payment of which, well and truly to be made we do hereby jointly and severally bind ourselves, our heirs and executors.

Sealed and dated this 31st day of January 1900.

The condition of the above obligation is such that,

Whereas on the 2nd day of December 1899, in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa in a cause then therein pending entitled John M. Ward, as plaintiff, against David Hardenberg and Moses H. Sherman, as defendants, and numbered 2195 the said district court rendered its judgment in favor of said Moses H. Sherman against said John M. Ward that the defendant Moses H. Sherman is the owner and entitled to the possession of the Sun Flower cattle range in Maricopa county, Arizona, a portion of
61 which is more particularly described as follows to wit: the northeast quarter of the southeast quarter of section 7 township 6 north range 9 east and also all horses on said range, also all wagons, saddles, mowing machines and other farming implements used on the said range together with all cattle branded with either the diamond (◇) brand or the HB brand which were heretofore turned over to said plaintiff on or about October 1st, 1894 by the Sherman Hardenberg Cattle Co. except such cattle as said plaintiff has sold and disposed of during the years 1894, 1895, 1896, 1897, 1898, 1899 and accounted for, by him, upon the trial of this action; and that said defendant Sherman be put into possession forthwith of all of said property and that the said Sherman have and recover of the said Ward the sum of $17,173.50 with interest thereon from the date hereof at the rate of seven per cent. per annum, together with his costs and disbursements incurred herein taxed and allowed at the sum of $36.65 and that two certain promissory notes for twelve thousand five hundred dollars each dated August 23rd, 1889 and bearing interest at the rate of eight per cent. per annum, executed by David Hardenberg to John M. Ward and the payment thereof guarranteed by Moses H. Sherman together with a chattel mortgage

executed by David Hardenberg to John M. Ward of even date therewith, upon the property mentioned and described in said mortgage to secure the payment of said notes be and the same are hereby adjudged paid, cancelled and discharged.

62 And whereas the said John M. Ward has appealed from the said judgment of the said district court and

Whereas it having been made to appear to the said district court that the said John M. Ward has complied with that part of said judgment concerning the right of the possession of the said Sherman to the property in said judgment and hereinabove described by delivering the same into the possession of the said Sherman, and

Whereas the said district court has fixed the amount of the appeal bond herein to stay the further execution of said judgment, at the above-named sum of $34,347.00:

Now therefore if the said John M. Ward shall prosecute his appeal with effect and in case the judgment of appellate court shall be against him that he shall perform its judgment, sentence or decree and pay all such damages as may be awarded against him upon the appeal then this obligation shall be void, otherwise it shall remain in full force and effect.

J. M. WARD.
CHAS. GOLDMAN.
F. L. CRISWELL.
LEO GOLDMAN.
SIMON NOVINGER.
JAMES E. BARK.
J. R. NORTON.

63 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Charles Goldman, F. L. Creswell, Simon Novinger, Leo Goldman and J. R. Norton and James E. Bark being duly sworn, each for himself and not one for the other on his oath says that he is worth the amount for which he has signed the foregoing appeal bond over and above his just debts and liabilities exclusive of property exempt from execution.

F. L. CRISWELL.
SIMON NOVINGER.
J. R. NORTON.
CHAS. GOLDMAN.
JAMES E. BARK.
LEO GOLDMAN.

Subscribed and sworn to before me this 31st day of January, 1900.

[SEAL.] A. J. EDWARDS,
Notary Public.

My commission expires March 4th, 1900.

(Endorsed:) 2195. J. M. Ward, plaintiff, *vs.* M. H. Sherman, *et al.*, def't. No objections as to form of bond, but reserve my right

to object to securities should I see fit so to do. C. F. Ainsworth. Supersedeas bond. Filed Feb'y 1st, 1900, 10 a. m. W. C. Foster, clerk. Withdrawn by Kibbey & Edwards 5 p. m. 2 / 1st 1900. Filed Feb'y 1st, 1900, 5–10 p. m. W. C. Foster, clerk. This bond withdrawn and replaced by new bond issued by the U. S. Fidelity & Guaranty Co. Feb'y 5 / 1900. W. C. Foster, clerk.

64 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JOHN M. WARD, Plaintiff,
vs.
DAVID HARDENBERG and MOSES H. SHERMAN, Defendants.

Know all men by these presents that we, John M. Ward, as principal, and the United States Fidelity and Guaranty Co., (a corporation hereunto authorized) as surety are bound unto Moses H. Sherman in the penal sum of thirty-four thousand three hundred and forty-seven dollars to the payment whereof well and truly to be made we do hereby, jointly and severally, bind ourselves, our heirs, executors and administrators and our successors.

Witness our hands and seals this 5th day of February 1900.

The condition of the above obligation is such that

Whereas on the 2nd day of December 1899, in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa in a cause then therein pending entitled John M. Ward, as plaintiff, against David Hardenberg and Moses H. Sherman, as defendants, and numbered 2195 the said district court rendered its judgment in favor of said Moses H. Sherman against said John M. Ward; that the defendant Moses H. Sherman is the owner and entitled to the possession of the Sun

65 Flower cattle range in Maricopa county Arizona, a portion of which is more particularly described as follows to wit: the northeast quarter of the southeast quarter of section 7 township 6 north range 9 east and also all horses on said range, also all wagons, saddles, mowing machines and other farming implements used on the said range together with all cattle branded with either the diamond (◇) brand or the HB brand which were heretofore turned over to said plaintiff on or about October 1st, 1894 by the Sherman Hardenberg Cattle Co. except such cattle as said plaintiff has sold and disposed of during the years 1894, 1895, 1896, 1897, 1898, 1899 and accounted for by him upon the trial of this action; and that said defendant Sherman be put into possession, forthwith, of all of said property and that the said Sherman have and recover of the said Ward the sum of $17,173.50 with interest thereon from the date hereof at the rate of seven per cent. per annum, together with his costs and disbursements incurred herein, taxed and allowed at the sum of $36.65 and that two certain promissory notes for twelve thousand five hundred dollars each, dated August 23rd, 1889 and bearing interest at the rate of eight per cent. per annum, executed

by David Hardenberg to John M. Ward and the payment thereof guarranteed by Moses H. Sherman, together with a chattel mortgage executed by David Hardenberg to John M. Ward of even date therewith, upon the property mentioned and described in said mortgage to secure the payment of said notes be and the
66 same are hereby adjudged paid, cancelled and discharged.

And whereas the said John M. Ward has appealed from the said judgment of the said district court to the supreme court of the Territory of Arizona, and

Whereas it having been made to appear to the said district court, under the provisions of said judgment concerning the right of the possession of the said Sherman to the property in said judgment and hereinabove described that the said Ward has delivered the possession thereof to the said Sherman, and

Whereas the said district court has fixed the amount of the appeal bond herein to stay the further execution of said judgment, at the above-named sum of $34,347.00:

Now therefore if the said John M. Ward shall prosecute his said appeal with effect and in case the judgment of the appellate court shall be against him that he will perform its judgment, sentence or decree and pay all such damages as may be awarded against him upon the said appeal then this obligation shall be void, otherwise it shall remain and be in full force and effect.

JOHN M. WARD.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By THOS. ARMSTRONG, JR.,
Its Attorney-in-fact,
And by W. K. JAMES, *Its Attorney-in-fact.*

[SEAL.]

(Endorsed:) 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. John M. Ward, plaintiff, *vs.* David Hardenberg, *et al.* defendants. Supersedeas bond. Approved and filed Feb'y 5th, 1900, at 4.10 o'clock p. m. W. C. Foster, clerk.

67 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendants. } Case No. 2195.

Be it remembered that on Saturday October 29th, 1898, that being a regular judicial day of the May term, 1898, of said court in and for said county and Territory then holden, the parties to the above-entitled action being present, the following record of this case was made for this day to wit:—

Title of Cause.

Ordered that this cause be continued for the term.

On Monday, June 5th, 1899, that being a regular judicial day of the April term, 1899, of said court, the following record in this case, for this day was made to wit:—

Title of Cause.

Ordered continued for the term, it appearing that service is not complete.

On Saturday, October 28th, 1899, that being a regular judicial day of the October term 1899, of said court, the following record in this case for this day was made, to wit:—

Title of Cause.

Set for trial November 14th, 1899.

68 On Tuesday, November 14th, 1899, that being a regular judicial day of the October term, 1899, of said court, the following record in this case was made for this day, to wit:

Title of Cause.

This cause coming on regularly this day for trial, before the court sitting without a jury, the plaintiff appearing by Jos. H. Kibbey, the defendant David Hardenburg, not appearing, the defendant Moses H. Sherman appearing by C. F. Ainsworth Esq., and on motion of C. F. Ainsworth, Frank Cox Esq. was added as counsel for said defendant.

The pleadings were read to the court by respective counsel. The plaintiff to sustain the issues on his part introduced a note which was filed as Plaintiff's Exhibit "A" and plaintiff rests.

The defendant M. H. Sherman to sustain the issues on his part called as witnesses J. M. Ward, John Norton, J. H. Spires, Joseph Monihon, Moses H. Sherman who were sworn examined and cross-examined and introduced documentary evidence to wit: Note filed as Defendants' Exhibit No. "1"; a bill of sale, filed as Defendants' Exhibit No. "2." An order filed as Defendants' Exhibit No. "3"; statement of the Sunflower ranch filed as Defendants' Exhibit No. "4" and defendant rests.

In rebuttal the plaintiff introduced an agreement filed as Plaintiff's Exhibit "B" and J. W. Ward was recalled to the stand and on cross-examination a letter was admitted in evidence and
69 filed as Defendants' Exhibit No. "5." James Keating, Leon Bouvier, Ramon L. Ortega witnesses for plaintiff were called, examined and cross-examined and plaintiff rests.

In surrebuttal the defendant called C. F. Ainsworth as a witness who was duly sworn and examined, and defendant rests.

The case being now declared closed and all the evidence being

introduced, arguments of respective counsel was had to the court, and the court does now take the same under advisement.

On Saturday, December 2nd, 1899, that being a regular judicial day of the October term, 1899, of said court the following record in this case was made this day to wit:

Title of Cause.

This cause having heretofore been tried argued and submitted to the court, and by the court taken under advisement. Now this day the court being fully and sufficiently advised in the premises, it is ordered by the court that judgment be entered herein in favor of the defendant.

On Monday December, 18th, 1899, that being a regular judicial day of the October term, 1899, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

Plaintiff's motion for a new trial herein coming on regu-
70 larly this day for hearing, was argued to the court by Jos. H. Kibbey Esq., for the plaintiff, and C. F. Ainsworth Esq., for the defendant, and was by the court taken under advisement.

On Saturday December, 30th, 1899, that being a regular judicial day of the October term, 1899, of said court, the following record in this case was made this day to wit:

Title of Cause.

The plaintiff's motion for a new trial herein having heretofore been argued and submitted to the court, and by the court taken under advisement. Now this day the court being fully advised in the premises, orders that the said motion for a new trial, be and the same is hereby overruled and denied.

On Thursday, January 11th, 1900, that being a regular judicial day of the October term, 1899, of said court, the following record in this case was made for this day to wit:

Title of Cause.

Comes now Jos. H. Kibbey of counsel for the plaintiff and in open court gives notice of an appeal of this case to the supreme court of the Territory of Arizona, from the judgment entered herein, and from the order of the court overruling the plaintiff's motion for a new trial.

On Wednesday, January 31st, 1900, that being a regular judicial day of the October term, 1899, of said court the following record in this case was made for this day to wit:

71 Title of Cause.

Comes now the plaintiff, and moving the court to affix the amount of an appeal bond to suspend execution of the judgment in this cause, represents that the plaintiff has complied with that part of the judgment relating to the possession of property, by the delivery of the possession thereof, to the defendant Sherman. That he has heretofore given a cost bond upon appeal in this cause.

Wherefore the plaintiff prays that the court will fix the bond at $34,347.00 that being double the amount of the money judgment rendered, to be given in addition to the cost bond heretofore given.

KIBBEY & EDWARDS, *For Pl'ff.*

I consent to this order if made.

C. F. AINSWORTH,
Attorney for Defendant Sherman.

The above motion granted, and so ordered.

WEBSTER STREET, *Judge.*

(Endorsed:) No. 2195. In the district court, third judicial district, Territory of Arizona, county of Maricopa. J. M. Ward, plaintiff, *vs.* David Hardenburg and Moses H. Sherman, defendants. Transcript of minute entries.

72 In the District Court, Third Judicial District, of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
against
DAVID HARDENBURG and MOSES H. SHERMAN, Defendants.

I, the undersigned clerk of the district court of the third judicial district of Arizona Territory, in and for Maricopa county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in Judgment Book "G" of said court, at page 57, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand, and seal of the district court, this 6th day of December, A. D. 1899.

W. C. FOSTER, *Clerk,*
By L. B. STREET,
Deputy Clerk.

(Endorsed:) No. 2195. In the district court, third judicial district, county of Maricopa, Territory of Arizona. J. M. Ward plaintiff *vs.* David Hardenburg *et al.* defendant-. Judgment-roll. Filed December 6th, 1899. W. C. Foster, clerk. L. B. Street, deputy clerk. No. 746. In the supreme court of the Territory of Arizona. J. M. Ward *vs.* David Hardenberg and Moses H. Sherman. Original papers. Filed Nov. 8th, 1900. Thomas Grindell, clerk. By Angie B. Parker, deputy.

73 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendants. } Case No. 2195.

Thos. F. Grindell, Esq., clerk of the supreme court of the Territory of Arizona.

SIR: An appeal has been taken by the plaintiff in the above-entitled action from the judgment and decision rendered therein in behalf of the defendant Moses H. Sherman, and against the plaintiff in this court on the 2nd day of December, 1899, which said appeal has been duly perfected.

I herewith certify and transmit to you the entire record in said cause; including original papers on file in this court, and all minute orders in the case; the decision and judgment rendered in said cause by this court, and entered of record therein, together with the testimony taken in the case as transcribed and certified to by the court reporter, and filed as a part of the record in this cause.

Dated this 8th day of November 1900.

[SEAL.] W. C. FOSTER,
Clerk District Court, Maricopa County.

74 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa, Hon. Webster Street, Judge, Presiding.

J. M. WARD, Plaintiff,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Defendants. } No. 2195.

Appearances: Messrs. Kibbey & Edwards, for plaintiff. C. F. Ainsworth, Esq., and Frank Cox, Esq., for defendant Moses H. Sherman.

Pleadings read to the court by the counsel.

Mr. AINSWORTH: There is no answer of Hardenburg offered. Now, at this juncture I desire to ask that Mr. Frank Cox be mentioned in the record as one of the attorneys for the defendant in this action.

The COURT: Very well. Now, the situation as developed by your answer is that in 1889 Ward sold to Hardenburg the ranch and stock of a certain brand—the diamond brand and Hardenburg brand, and these notes were executed at that time and Sherman became surety on the note; and at that time there was a mortgage back by Hardenburg of all the property that he got from Ward, his own stock and also including some stock of Sherman's.

Mr. KIBBEY: I don't know that that is in there.

75 The COURT: The Hardenburg stock. That then there was a company organized and they took the title subject to that mortgage. Then, when was it—some time after that when the notes——

Mr. KIBBEY: It is not particular as to when this property was returned.

The COURT: Well, afterwards the Hardenburg Company entered into an agreement with Ward to turn him back all the property, and he should surrender the notes. Is that the situation?

Mr. AINSWORTH: Yes, sir. And they should turn over to Ward all the property, and he was to cancel the notes and discharge the mortgage and deliver up the notes.

The COURT: And now then Ward is suing on one of these notes. On which one?

Mr. AINSWORTH: On the one that became due first.

The COURT: You are asking not only to cancel the notes, but to redeem?

Mr. AINSWORTH: Here is the situation we are in: Our position is this: That when this contract was made with Mr. Ward to turn over to him these cattle and this property and he deliver up these notes and mortgage, that that was a contract entire on each side—we were to deliver certain things to him, by which he was to turn over the notes. Now he goes down and takes possession of that property; but it was a condition upon which he took possession of that property, acting under that contract, that he turn over to us those

76 notes and mortgage canceled. He takes the property and refuses to turn over either the notes, and the mortgage is unsatisfied. Here is a note outstanding, or was at that time, not yet due, drawing 8% interest. He holds those notes and brings suit on one note. Our contention is this: That contract was entered into, and if Mr. Ward took possession of the property he should either take possession of all or turn over to us those notes. He didn't do that. Now, the only contention we have is, we owe the notes and he is a mortgagee in possession.

The COURT: Then you call the contract abandoned?

Mr. AINSWORTH: Yes, sir. He has not sued on the contract; he has sued on the notes. He abandoned it by bringing his suit. Now the contract is an entirety and he has abandoned it. He is a mortgagee in possession.

The COURT: Is that your understanding of the lawsuit, Judge Kibbey?

Mr. KIBBEY: So far as his side of it is concerned, that statement is correct. That said note is due and unpaid; that there is now due thereon the sum of $1500—that is our complaint. Now, it is true that the agreement was entered into. The situation is practically as Mr. Ainsworth has stated it: That Ward did sell to Hardenburg, that Hardenburg mortgaged back for a part of the purchase-money; that afterwards Sherman-Hardenburg Cattle Company was organized; that they gave back a mortgage; that mat-

ters went on for some considerable time. As a part of the
77 history of the country we know that cattle went down just about that time and became practically valueless. Then they entered into an agreement afterwards. We concede that agreement, except they didn't do one thing.

The COURT: You claim, then, that they didn't perform their part of the agreement?

Mr. KIBBEY: Yes, sir. This is the agreement made between the Sherman-Hardenburg Cattle Company and Mr. Ward. (Counsel read agreement to the court.) Now, under that agreement everything except what had been sold prior to September 1st, 1894, shall be given back in discharge of these notes.

The COURT: That was September immediately preceding the giving of the instrument?

Mr. KIBBEY: Yes, sir. This is dated the 12th of September. (Reading.) It being understood that all stock cattle which may have been sold subsequent to September 1st, 1894, shall be accounted for by the party of the second part to the said party of the first part. That in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof and delivering possession of the same to the said party of the first part or his authorized agent in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to the said David Hardenburg and one M. H. Sherman two promissory notes—and describing them as being these notes, etc.

78 The COURT: Now, what part of this property was it you claim was not turned over?

Mr. KIBBEY: 104 head of cattle. I now introduce the note, if your honor please, that we sue on.

Mr. AINSWORTH: No objection.

Same filed as Plaintiff's Exhibit "A."

Mr. KIBBEY: That is our case, if your honor please.

Plaintiff rests.

Mr. AINSWORTH: There being no answer in here to the counterclaim, I take it that under section- 671–672, page 167, of the Revised Statutes, they have made no answer; it's just like a complaint with no answer. "It shall not be necessary for a plaintiff to deny any defense pleaded by the defendant, but the same shall be regarded as denied, unless expressly admitted." The situation in this case is, they have put in no pleading whatever as to this mortgage and note; and they expressly admit, so far as I understand statement of the counsel to the court, the facts substantially as I stated them. With no pleading in here, it is pretty hard to tell what they mean. If it goes in of record as an admission in the case——

The COURT: No. It was only explanatory of the situation. The issue stands this way now, as I conceive it: They have brought suit

on a promissory note, and asked that so much be recovered
79 on it. You have made defensive matter to that, and alleged affirmative matter in which you allege a contract. Now that is deemed denied by the statute. So it stands precisely as though he had said he denies each and every allegation of the counter-claim. That, I think, must be the situation.

Mr. AINSWORTH: Of the counter-claim. I pleaded it by way of a counter-claim.

The COURT: Yes, sir. You are making affirmative matter. (Reading:) It shall not be necessary for the plaintiff to deny any special matter pleaded by the defendant, but the same shall be regarded as denied, etc. And whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matter under oath when relied on by him. I think it simply stands as a general denial as to your allegations. I think that must be the way the issue now stands—a general denial to your allegation.

Mr. AINSWORTH: I will ask Judge Kibbey if this is the note that he produced here this morning at my request.

Mr. KIBBEY: Yes, sir.

Mr. AINSWORTH: We offer in evidence, then the other $12,500 note, with the endorsement on it. I want to put Mr. Ward on the stand.

Mr. KIBBEY: It has been in my possession as his attorney—both the notes have been in our possession.

The COURT: Then it is admitted that the second note is in
80 the possession of the plaintiff, and is now produced in court and admitted as evidence.

Mr. KIBBEY: I produced this note under notice to me to produce it. That I want in the record, too.

Mr. AINSWORTH: Now, I will ask if Judge Kibbey will admit that this agreement that is attached hereto is a correct copy. I can send down for the original. The other mortgage is on record. It is filed as a chattel and on the realty too.

Mr. KIBBEY: Subject to any clerical errors, of course.

Mr. AINSWORTH: I desire to offer in evidence the mortgage which I read from Exhibit "A." I will prove by the recorder it is still on record.

Mr. KIBBEY: I have no objection to that, except to any clerical errors.

Mr. AINSWORTH: Will you admit it is still on record unsatisfied?

Mr. KIBBEY: Yes, sir.

The COURT: There is now introduced in evidence, marked Exhibit "A," attached to defendants' counter-claim, filed and recorded at the request of John M. Ward August 26, 1889, at 4.30 o'clock p. m., in the county records of Maricopa county, mortgage record, admitted by the other side; and the record shows it is still unsatisfied.

Instrument then read into the record without objection, as follows:

81 "Know all men by these presents that I, David Hardenburg, residing in the county of Maricopa in the Territory of Arizona, party of the first part, being justly indebted to John M. Ward, now residing in the county of Maricopa aforesaid, party of the second part, in the sum of $25,000, which is hereby confessed and acknowledged, have, for the purpose of securing the payment of said debt, granted, bargained, sold and mortgaged, and by these presents do grant, bargain, sell and mortgage unto the said party of the second part, and to his heirs and assigns forever, all that certain real and personal property situated in the county of Maricopa and Territory of Arizona, and described as follows, to wit: All my right, title and interest which I may now own or may hereafter acquire in and to that certain tract of land known and called the Sun Flower cattle range in the Prescott land district and heretofore occupied by the said John M. Ward and by him sold and transferred to me, together with the diamond (◇) cattle brand heretofore owned by said John M. Ward and by him transferred and sold to me; also the Hardenburg cattle brand known and described as HB, together with all the cattle now on said Sun Flower range and Verde range branded with either of said brands, or which shall hereafter be owned on said Sun Flower range or in the Territory of Arizona by me or my assigns branded with either of said brands during the continuance of this mortgage, except as hereinafter provided. Also the horses now on said Sun Flower cattle range, being twenty-five in number. It being expressly understood that the party of the first

82 part may from time to time dispose of the present horses on said range, provided he keeps at least twenty-five in number of an equal amount in value on the range to which this mortgage shall apply, and that all the steers now on said cattle ranges, or which may hereafter be owned on the same, shall be exempt from the provisions of this mortgage as included herein, and that the party of the first part or his assigns shall have exempt from the provisions of this mortgage and which are not included herein fifty head of cows per year, to be selected by the party of the first part or his assigns at such times as he or they may desire. All of said property being now in possession of said first party in the county and Territory aforesaid.

"To have and to hold all and singular the real and personal property aforesaid forever, provided always, and these presents are upon the express condition: that if the said party of the first part, his heirs and assigns shall pay or cause to be paid unto the said party of the second part, *her* heirs or assigns the sum of twenty-five thousand dollars and interest thereon from December 1st, A. D. 1889, at the rate of eight per cent. per annum, interest payable annually according to the conditions of two promissory notes executed by David Hardenburg, payable to the order of John M. Ward, payable at the office of C. F. Ainsworth in Phœnix, A. T., viz: $12,500 dated Aug. 23, 1889, due October 1, 1894, with interest thereon at 8% per annum until paid from October 1st, 1889, interest payable annually, with a right to pay the

whole or any part of said note at any time; $12,500
83 dated August 23, 1889, due October 1, 1897, with interest thereon from October 1st, 1889, at the rate of 8 % per annum until paid, interest payable annually, with a right to pay the whole or any part of said note at any time. Then these presents to be void and of no effect. Provided, further, that the said party of the first part or his assigns may sell the cattle or any number thereof covered by the provisions of this mortgage at any time by applying the proceeds thereof to the payment of the principal of either or both of the aforesaid notes, and upon such application the said John M. Ward or his executors or assigns shall release to the party of the first part or his assigns the cattle so sold, provided said cattle shall not be sold for less than twenty-one dollars per head, and it is provided further that the party of the first part and his assigns shall, during the continuance of this mortgage continue hereafter exclusively the diamond brand on said ranges. But if default shall be made in the payment of said sum of money, either principal or interest, at the time when the same shall become due and payable, or if the party of the first part or his assigns shall violate any of the provisions of this mortgage, then thereupon and thereafter it shall be lawful, and the said party of the first part hereby authorizes the said party of the second part, his heirs or assigns, or his or their agent, to take said property wherever the same may be found and sell and dispose of the same and all equity of redemption therein at public auction after giving twenty days' notice
84 of said sale in some newspaper published in the county, and upon said sale convey to the purchaser thereof all the right, title and interest of the party of the first part or his assigns, in and to the property so sold, retaining such amount from the proceeds of such sale as shall pay the aforesaid notes and interest, costs and expenses and an attorney's fee of five per cent. for foreclosing the same, providing that no more property shall be sold than sufficient to pay the same.

"As long as the conditions of this mortgage are fulfilled the said party of the first part or his assigns are to remain in the peaceful possession of said property.

"In witness whereof, the said party of the first part has hereunto set his hand and seal this 23rd day of August, A. D., 1889.

"(Signed) DAVID HARDENBURG. [SEAL.]

"In the presence of—

"C. F. AINSWORTH.

"TERRITORY OF ARIZONA, }
"*County of Maricopa,* } ss:

"David Hardenburg and John M. Ward each being severally and duly sworn on oath each for himself deposes and says: That he, David Hardenburg, is the mortgagor who executed the foregoing mortgage, and that he, John M. Ward, is the mortgagee in said

mortgage described, and that said mortgage is *bona fide* and made without any design to defraud or delay creditors.

"(Signed) DAVID HARDENBURG.
"JOHN M. WARD.

85 "Subscribed and sworn to before me this 24th day of August, A. D. 1889.

"[NOTARIAL SEAL.] (Signed) C. F. AINSWORTH,
"*Notary Public.*"

"TERRITORY OF ARIZONA, }
"*County of Maricopa,* } ss:

"Before me, C. F. Ainsworth, a notary public in and for said county of Maricopa, on this day personally appeared David Hardenburg, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

"Given under my hand and seal of office this 24th day of August, A. D. 1889.

"(Signed) C. F. AINSWORTH,
"*Notary Public.* [SEAL.]

"Filed and recorded at request of John M. Ward, August 26, 1889, at 4.30 o'clock p. m.

"(Signed) NERI OSBORN,
"*County Recorder,*
"By C. B. MING, *Deputy.*"

J. M. WARD, a witness called on behalf of defendant and duly sworn, testified as follows:

Direct examination.

By Mr. AINSWORTH:

Q. What is your name?

A. John M. Ward.

86 Q. Where do you reside?

A. I reside in Oroville, Butte county, part of the time; part of the time in Arizona.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. You reside part of the time in Arizona at what is known as the Sun Flower ranch?

A. There and in Phœnix.

Q. You are the man that is claimed to own the Sun Flower cattle ranch and the diamond brand?

A. Yes, sir.

Q. In 1889 did you own that property?

A. Yes, sir.

Q. What did you do with it in that year?

A. In October—no, in August—I may be a little mistaken as to dates at times——

Q. At the date these notes were given?
A. Yes, sir; I believe so.
Q. That was August 23rd?
A. Yes, sir; in your office in this town this contract was made and consummated. You know that, but I will state it. I was in his office and this contract was consummated and entered into and those notes were given.
Q. Now, what did you turn over, Mr. Ward, to these people in consideration of these notes?
A. I turned over the Sun Flower range, cattle and horses
87 and everything that pertained to it.
Q. Was that a description of the property as described, so far as it related to the Sun Flower range, in the mortgage you had back at that time?
A. I believe, as near as I can recollect without reading it, there was nothing reserved that I know of.
Q. You got the Hardenburg cattle brand, too; did you not?
A. Yes, sir. They were running on the Verde river; they were put in also.
Q. In the mortgage back to you?
A. I didn't sell them, but they were included in the mortgage back to me.
Q. Did you give them any documents or papers as to what there was, except the mortgage?
A. No, I believe not; not that I recollect of.
Mr. KIBBEY: Have you any other papers referring to it?
A. No, sir; nothing only some letters.

Mr. AINSWORTH:

Q. I mean as to that contract?
A. Nothing I can recollect of.
Q. Then you turned the property over to them at that time?
A. Yes, sir; I sold it to them for $34,500.
Q. Was there any cash paid down at that time?
A. There was $9,500, I believe—that's my recollection.
Q. Who paid it?
88 A. M. H. Sherman.
Q. Here in Phœnix?
A. Here in Phœnix. Either $9,000—I won't say which it was, $9,000 or $9,500.
Q. Was there anything paid, Mr. Ward, in addition for any other accounts or bills you had at that time to make up $10,000?
A. No; there was no other that I know of.
Q. Was there any bills due from merchants up there that you had furnished meat to Fort McDowell, that you turned over at that time, for which they paid you money?
A. No, sir; it was the resources, I turned that over to the company. I had a contract to furnish meat to the Government at McDowell. The contract was made and talked of some time in July or August; I won't say which.
Q. That was the contract with you?

A. Yes, sir; with Hardenburg and me; and I told him he could have all the results of the cattle sold to the Government, and when the trade was consummated I had been running that contract there with the Government for some time, and I think I turned over to David Hardenburg over $400 in money.

Q. Now, then, the interest when it became due, who paid that interest?

A. Mr. Sherman when it became due he defaulted and I commenced to take action to foreclose as the mortgage provided in default of the interest being paid; and then it seemed he was
89 mistaken and you came to San Francisco and he had me go there, and after it had been in default a month or more I set it aside and took the $2,000 interest.

Q. And something besides—interest on the interest?

A. No, sir.

Q. You got $2,000 and the interest on $2,000 for a month?

A. No, sir; just simply the $2,000 which was lying in the Wells, Fargo & Company express at Oroville.

Q. Was that the first $2,000?

A. Yes, sir.

Q. After that how was it paid?

A. It was paid generally by January up until the last, up until the last payment there was $1,000 paid and the other defaulted, the time expired, and there was another $500 paid to me at Oroville and another $500 paid by you in this city. That was long after default had been made.

Q. In the interest?

A. Yes, sir.

Q. How much interest was paid—I want to get at the amounts?

A. I think the notes shows $8,000.

Q. That was actually paid.

A. That is the interest, I believe. It is what is on the note.

The COURT: It would be safe to say the amount of interest was paid which was endorsed on the notes?

90 A. Yes, sir.

Q. I have also understood there was $8,000 paid, interest on there?

A. (Witness examining note.) Well, this was paid in parts here.

Q. Isn't there $4,000 on each of them in interest?

Mr. KIBBEY: Just give the aggregate, Mr. Ward.

A. This note has $4,000 interest on it, paid at different times.

Q. See if the other one has the same? (Paper handed to witness.)

A. Yes, sir; this is the same, $4,000 on that one.

Q. When did you take possession—did you ever take possession of the Sun Flower range again?

A. Yes, sir; I did.

Q. What year was that in?

A. I can't refresh my memory on that, but September, 1894—I ain't certain of the date.

Q. You came here yourself?

A. Yes, sir.

Q. And took possession?

A. I sent the papers ahead to my son. He went up, I think. Now, that's my recollection. He went to the ranch and found Mr. James Keating in possession and he turned it over to him, and the boy left Peter Bean there in possession of it. That was
91 some time the last of September.

Q. Now, what did you take possession of in September, you or your son either one?

A. We took possession generally of the Sun Flower range and cattle and horses there which was on the ranch.

Q. Anything else?

A. Buildings, farming utensils and everything pertaining to it. There was one piece of property which was included I never got possession of; that was the Desert Wells.

Q. Didn't you get possession of that?

A. No, sir.

Q. Didn't you sell it?

A. No, sir; I didn't sell the Desert Wells. David Hardenburg had a homestead on the Desert Wells and refused absolutely to surrender possession.

Q. Didn't you take some possession of them and dispose of them?

A. No, sir.

Q. Didn't you dispose of them by a bill of sale?

A. I disposed of my interest in it.

Q. It was Government land, wasn't it?

A. No, sir; David Hardenburg, as I told you, had a homestead on it.

Q. What did you sell in the Desert Wells then?

A. I sold the timber in the corrals, that made very good
92 firewood; and a little pump there. The pump was very nearly worthless, and the flues was burned out of the engine. I went out and looked at it—I never had any idea of ever commencing action to recover it.

Q. What did you realize for it?

A. I got $500 for my interest in it, what was considered to belong to the company.

Q. What cattle did you take possession of—how many head?

A. I don't know how many head; I don't think any other man could tell.

Q. Some of them are hid and you have never gathered them?

A. Yes, sir.

Q. On the range yet?

A. Yes, sir.

Q. The cattle range, the property itself, stood in your name?

A. When?

Q. At that time?

A. So far as the mortgage was concerned and everything until it was surrendered in California.

Q. Didn't the deed of the range stand in your name?

A. No, sir; in David Hardenburg's name—that is, for me; but he mortgaged it back and surrendered it back.

Q. Didn't Mr. Hardenburg deed to you on February 9, 1893, lots one, two and three, and the northeast quarter of the south-
93 west quarter of section seven, township six, nine east?

A. (No answer.)

Q. That's part of the Sun Flower range?

A. Yes, sir.

Q. Was that a part of the range you had that you turned over to Hardenburg and he got the title and then put it back in you by deed so you would have the title?

A. Yes, sir.

Q. Then all the property up there that there was any title to was in you?

A. Yes, sir.

Q. And it had been deeded back long prior to September, 1894?

A. Yes, sir.

Q. That was in accordance with an agreement?

A. Yes, sir.

Q. So far as all the title to the real estate was concerned then it was in you long prior to that?

A. Yes, sir.

Q. So there wasn't any real estate to deed to you?

A. No, sir.

Q. Now, was there a bill of sale made to you at the time of the personal property, any portion of it?

A. I heard it read here, that there was an agreement between themselves.

Q. Any bill of sale made to you of any portion of this
94 property, any wells or any thing of that kind?

A. No, sir; nothing only what was included in the mortgage.

Q. Wasn't there a bill of sale made to you bearing date October 9, 1894, and by you filed with the county recorder, of the Desert Wells?

A. No, sir; none made to me. I sold about that time.

Q. I ask you, Mr. Ward, if I didn't myself, as secretary of the company, sign a bill of sale and give it to you.

A. Yes, sir.

Q. That's what I asked you, if there wasn't a bill of sale of part of the Hardenburg property made to you?

A. I have got it here. Let it be construed.

Q. This one is on record?

A. I don't know about that one. I have one made by you. (Witness producing paper.)

Mr. KIBBEY: Look at the other one. (Handing another paper to witness.)

A. (Witness examining papers.) Well, you see that's the reason why I was mistaken. This was made to my son and filed by him; not made to me. It's signed here, you see. I think this was made to him.

Q. It says to J. M. Ward on its face?
A. He was acting as my agent.
Q. He filed it in the recorder's office?
A. I never heard of this before this.
95 Q. Don't you remember of coming down here and coming to my office and saying to me, "Mr. Ainsworth, I am going to have trouble to get those wells, and I want a bill of sale or an order to go out to Dave Hardenburg and get them;" and then I made a bill of sale and gave it to you. You had some follow you were going to sell it to?
A. I have no recollection of this paper.
Q. Is that man your son that purports to sign that?
A. Yes, sir.
Q. Was he acting for you down here?
A. Yes, sir. However, notwithstanding this paper, I never got possession of the Desert Wells.
Q. I asked you if a bill of sale wasn't made to you?
A. I said I didn't recollect of it; and I don't yet; but I suppose it was made.
Q. Do you deny it now?
A. No, sir; I don't deny it.
Q. This is certified to by Mr. Osborne?
A. I recollect the circumstance well enough that I never got possession of the Desert Wells; and I have told you the cause.

Mr. AINSWORTH: We want to offer this in evidence.
No objection same filed as Defendants' Exhibit 2.

Q. I will ask you if an order wasn't given to you for all the cattle and everything on the Sun Flower range; and if so, if you have that order?
96 A. I believe this was the order.
Q. Will you produce it?

(Witness produces paper.)

Q. Now, did you go up and take possession of the cattle under that?
A. You will see by that order H. C. Ward was made my agent.
Q. I ask you if you took possession under that order?
A. Yes, sir; I took possession of all the cattle I could get.

Mr. AINSWORTH: We offer in evidence, if the court please, this order under which he took possession.
No objection, same filed as Defendants' Exhibit 3.

Q. Since that time you have managed and operated the property?
A. Yes, sir.
Q. Controlled it and disposed of cattle and handled it?
A. Yes, sir.
Q. How many cattle have you sold off that property this year?
A. Those are questions I can't answer. I supposed I had no partner and therefore nobody to account to for; and I ain't kept

one sign of a book account; but I will say positively I can make the statement——

Q. Have you sold any?

A. Yes, I have sold some.

Q. This year?

97 A. Yes, sir; some in May and April.

Q. Who did you sell in May to?

A. I sold some to Mr. John Norton.

Q. John R. Norton?

A. Yes, sir; I think in April he got them.

Q. This year?

A. This last year; yes, sir.

Q. 1899?

A. Yes, sir; and some to Joseph Monihon.

Q. What month?

A. I think he got his some time about the first of May; some time in May.

Q. Who else did you sell to this year?

A. Well not any—maybe one to two or three different ones. I don't know but the boy sold some that was out here on pasture, brought in by Mr. Sears. I don't know how many head there was; only a few head.

Q. Who to?

A. I think Mr. Norton got them; I ain't certain.

Q. Have you or the boy sold any cattle this year off the range except to Norton and Monihon?

A. I don't recollect now of having sold any.

Q. Did you sell any to this man Johnson?

A. No, sir.

Q. Did you sell any to some firm in Texas?

98 A. I did once, two years ago.

Q. I mean this year?

A. No, sir; not this year.

Q. How many cattle did you sell in the year 1894, after you took possession?

A. I have answered that question to say I kept no account of it and don't know. Didn't sell any that I know of in 1894.

Q. Did you sell any in 1895?

A. I said I did. I think I sold some to Goldman and Creswell.

Q. Didn't you keep any account of it?

A. No, sir; didn't suppose I would ever have anybody to account to.

Q. Did you ever make a statement to anybody of what cattle you sold in 1894?

A. No, sir.

Q. Did you ever make any statement of how many you sold in 1895 off this range?

A. I don't know but I might have; I don't recollect.

Q. If you made any statement, did you take that from any book or memorandum?

A. No, sir.

Q. Did you make any statement to any person of any cattle you sold in 1895 off this range?

A. That I don't recollect. I might have had some talk to
99 people; but I don't recollect it.

Q. Did you make any written statement to anybody?

A. No, sir.

Q. What was this firm you sold to in Texas?

A. Crowley, Garrett & Co. of Midland, Texas.

Q. How many did you sell them?

A. Counting everything, 2629 head, I think, or 2619 head; somewheres about that.

Q. How much did you get for those?

A. I got $14.50 a head, counting everything that walked. That contract is reduced to writing and I have got a copy of it.

Q. Have you got that with you?

A. No, sir.

Q. Can you produce it?

A. I think I can. I wouldn't swear positively I could. I don't see why I couldn't.

Mr. KIBBEY: Why the contract?

Mr. AINSWORTH: I thought I could get at the price from it.

Mr. KIBBEY: It didn't show the amount in the contract; it varied.

A. I think it was 2619 head.

Q. Did you sell from that range between 1894, at the time you took possession back, and 1897, 1600 head?

A. No, I didn't sell that many. 1898 was the season I sold to the Texas parties, wasn't it. I did including the Texas sale.

100 Q. When did you make the Texas sale?

A. It will be two years this coming February. I didn't want that to include that.

Q. I asked you in 1897; I understood you made this Texas sale in 1898?

A. A year ago last February; it will be two years again this coming February.

Q. A year ago last February would be February, 1898?

A. Yes, sir.

Q. Who did you say that was?

A. Crowley, Garrett & Company of Midland, Texas.

Q. You sold how many head to them?

A. 2619 head, I think; within one or two of that.

Q. That included calves and everything?

A. Everything that walked.

Q. You got how much for those?

A. $14.50 a head, counting everything.

Q. Did you sell any calves in 1898 to anybody else but to those fellows?

A. Not that I recollect. Oh, no; maybe two or three or four.

Q. I mean any bands?

A. Yes, I sold little bunches again that Sears brought in from the

Verde; and I had them here and there was such a collapse in
101 cattle I couldn't sell at all, and I had started to drive them back to the ranch and Mr. Norton overtook me and bought them at his own price. Well, I ain't going to say how many calves.

Q. What year was that in?

A. I didn't get them into the Texas shipment. I was to put them into the Texas shipment and didn't get them in. There was a collapse came on during the Spanish war and I couldn't get a place to stay over night with them hardly, and my friend Norton took advantage of my necessity and bought them at his own price.

Q. Did you sell in 1895 $7,000 worth of cattle from that range?

A. I don't know sir.

Q. Did you make a statement to that effect?

A. It is possible I might. It is possible I sold that many cattle; but I don't know that I did. I have no book accounts to show.

Q. In 1896 did you sell as many as $7,000 worth?

A. I think not. I sold those two years to Creswell and Goldman and they paid me the money and I have no account of it.

Q. Do you mean to say you didn't keep any account of your business there at all?

A. No, sir; there are no books kept; only accounts of the hired men.

Q. Don't you keep account of any man who buys cattle from you?

A. No, sir; because he pays me the money.

102 Q. Did you in 1897 sell $8,000 worth of cattle from that range?

A. No.

Q. Did you make a statement to that effect?

A. No, sir.

Q. Never did?

A. I sold no cattle—let me see, 1898 was when—no, I don't think I did. I can't say for certain.

Q. In 1898 you have given all you sold to Garrett?

A. Yes, sir; I have given that.

Q. And the amount you got per head?

A. Yes, sir.

Q. Did you sell to anybody else in 1898 except Garrett?

A. I have already answered that question. As I told you, Mr. Sears brought in some from the Verde and I didn't get them into the train that went off, and I couldn't find a man that would let them stay in his pasture over night. I have answered that question.

Q. Then in 1899 you made no sales of cattle from that range except to Norton and Monihon?

A. I believe not that I recollect of. There might be an odd one some place. This is all from my memory of things. I have no book account.

Q. I will ask you if you made a statement of your sales of cattle—how much you had sold from 1894 to 1898, to a firm
103 in Los Angeles by the name of Hollingsworth?

A. I recollect talking to an agent. I didn't make a state-

ment direct to them. He wanted to take it down; said he wanted to sell it; but I afterwards believed he was an imposter. He said he wanted to buy the property.

Q. Did you write to them about it?

A. Not that I recollect of. If they wrote to me, I possibly might have answered it.

Q. Were you advertising the property for sale at that time?

A. No, sir.

Q. And hadn't written to them about it?

A. No, sir; I never advertised it with anybody for sale. I never advertised it but once, and that was in the Kansas City Times.

Q. When was that?

A. It's many years ago—as much as 12 years ago.

Q. Did you make a statement to Hollingsworth?

A. I didn't know the man. He came and asked me the price on it. I did give him a price on it and told him about the stock.

Q. Did you take him up to the range?

A. No, sir; it was here in Phœnix.

Q. Where did this occur?

A. I said here in Phœnix.

Q. It all took place here?

A. Yes, sir.

104 Q. Do you know how many cattle are on the range yet?

A. No, sir.

Q. Do you know how many you brand each year?

A. Pretty near.

Q. How many did you brand in the year after you took possession of them, say the spring of 1895 or fall of 1894–'95?

A. I don't know now.

Q. Didn't you keep a record of what you branded?

A. No, sir.

Q. You don't know anything about it?

A. Perhaps when I am there branding I may run through a slip of paper and count it up.

Q. So you can't tell anybody, if you wanted to sell, how much you have got?

A. No, sir.

Q. Do you know how many you branded in 1896?

A. I told you there is no book account of those things.

Q. You have no book account at all?

A. No, sir; not of the calves or anything of that kind. If you would ask me a month or so after, I could tell you.

Q. Could you tell a man how much you branded this year?

A. Yes, sir.

Q. How much did you brand this year?

A. The boys are branding now; ain't quite done. They will be done in a few days.

105 Q. How many have you branded up to date?

A. 415 when I left the ranch a week ago.

Q. Do you know how much you branded last year—1898?

A. No, sir; we must have branded somewhere between 500 and 600 head. I don't know exactly.

Q. It was between there somewhere?

A. Yes, sir.

Q. How much was it the year before?

A. I don't recollect. The biggest branding I ever made on the range I think that was the year before, before I sold to the Texas parties. That was 1180 I recollect.

Q. Did you make a statement in writing that you branded in 1897 a thousand head of calves?

A. I think 1180 was the statement I made.

Q. Wasn't it in 1897, 1280 you branded?

A. I think not; I think it was 1180. Possibly it might have been 1280; I ain't got any figures.

Q. In 1897?

A. There's one year I branded about a thousand and the next year 1280.

Q. What year was that?

A. That was the year before I sold to the Texas fellows; 1897, I think.

Q. Then you did brand a thousand in 1897?

A. No, sir; 1896.

Q. How many in 1897?

106 A. 1180 or 1280.

Q. How many in 1898?

A. Somewheres between 500 and 600, I have stated.

Q. How is it you are able to state how many you branded in that year, 1897, and can't state how many you branded in 1898?

A. I said between 500 and 600. 1180 is the biggest branding I ever made on the range. I ain't talking from record, because I kept no record. I had a little note-book I lost right here in the streets of Phœnix once that had my brand in. I never have seen it since.

Q. You haven't any idea how many cattle are on the range now?

A. I have already answered that I don't know.

Q. How many horses?

A. Work horses and mules included, about 50 head.

Q. How many wagons?

A. I bought a new wagon last spring, a fine wagon. That's the only wagon worth mentioning on the ranch.

Q. Any other implements there, and saddles?

A. There never was any saddles figured in this case.

Q. Any harness?

A. Yes, some.

Q. Machinery—those things are all there yet?

A. Yes, sir.

Q. You say you do keep account of how much you pay

107 your men. How much did you pay your men in——

A. You are coming to something that would take me a long time to get up. After the men are settled with there's no attention paid to it.

Q. In 1895?

A. I don't know.
Q. In 1896?
A. The same answer.
Q. 1897?
A. I was accountable to nobody.
Q. Nor 1898?
A. 1898 I paid out a good deal of money for delivering those cattle here, but I don't know how much.
Q. This year up to date?
A. I ain't figured it up.
Q. Can you state what your expenses in running the range were in 1895?
A. No, sir.
Q. 1896?
A. No, sir.
Q. 1897?
A. No, sir. I couldn't say unless I went and hunted it up and figured it up.
Q. Nor 1898 nor this year?
A. No, sir.
108 Q. About what does it cost you a year to run that range?
A. It sometimes run as high as $5,000 a year.
Q. How do you get at those figures?
A. Just simply by knowing what my cash is.
Q. What your cash receipts are, what you expend, and what you have left?
A. Yes, sir; I keep no account of it.
Q. You can't give any figures for any of those years, as to what it cost you?
A. No, sir.

Witness excused.

Mr. JOHN R. NORTON, a witness called on behalf of the defendant and duly sworn, testified as follows:

Direct examination.

By Mr. AINSWORTH:

Q. Where do you reside?
A. Phœnix.
Q. Your name is John R. Norton?
A. Yes, sir.
Q. Are you acquainted with Mr. J. M. Ward?
A. Yes, sir.
Q. What business are you engaged in?
A. Feeding cattle at the present time.
Q. You buy cattle and feed them?
109 A. Yes, sir.
Q. How long have you been in that business?
A. In this valley about five years.

Q. Did you purchase any cattle of Mr. Ward during this year?
A. Yes, sir.
Q. How many, if you know?
A. (Witness referring to memorandum.) About 141 head, al told, I believe—or 140 head.
Q. What kind of cattle were those?
A. They were mostly steers.
Q. At what prices?
A. I think the threes was $21.50, and the twos was $13, and cows $14.
Q. Do you know how much money you have paid all told to him?
A. All told?
Q. I mean how much did they all come to?
A. $2,431.50.
Q. Did you buy any cattle from Ward last year?
A. A small bunch, about $325 worth. That's included in this—25 head.
Q. Did you buy any in 1897?
A. No, sir.
Q. Or 1896?
A. No, sir.
Q. Or 1895?
110 A. No, sir.
Q. Did you go down there to look that ranch over with him once?
A. I was down there in 1897—October, I believe it was.
Q. With Mr. Ward?
A. Yes, sir.
Q. For what purpose?
A. I was looking at the ranch and the cattle for the purpose of buying them.
Q. Did you have any conversation at that time with Mr. Ward in relation to how many cattle he had on the range?
A. Yes, sir.
Q. Did he tell you how many he had?
A. Yes, sir.
Q. How many did he tell you?
A. He thought he had about 4,000.
Q. At that time?
A. Yes, sir.
Q. Did he tell you how many he branded that year?
A. I think about 1180 to 1200.
Q. Did he tell you how many he branded the year before?
A. He probably did, but I don't remember what the brand was. It seems to me it was something like 800 or 900 head.
Q. That was in 1897?
A. It was 1897 I was up there.
Q. Did he tell you how many he branded in 1895, soon
111 after he got them back?
A. Not that I remember of. He possibly did, but I don't remember.

Q. Did he request you to go up there to look it over for the purpose of purchasing it?

A. We talked it over in Phœnix, and he gave me his price and the number of cattle he had, and I went and looked the range over.

Q. Have you talked with him since as to how many he branded in 1898 and 1899?

A. No, sir.

Q. Those are the only cattle you ever bought of Ward, you have mentioned?

A. I think so.

Witness excused.

Mr. J. H. SPIRES, a witness called on behalf of defendant and duly sworn, testified as follows:

Direct examination.

By Mr. AINSWORTH:

Q. What is your name?

A. J. H. Spires.

Q. Where do you reside?

A. Los Angeles.

Q. What is your business?

112 A. I am engaged in mining and real estate.

Q. Where do you mine?

A. Sonora, Mexico.

Q. How long have you been engaged in the mining and real-estate business?

A. I have been engaged in the real-estate business for several years past; mining business for about two years.

Q. Are you acquainted with Mr. J. M. Ward?

A. I met him once.

Q. When, where, on what occasion, and how did you come to meet him?

A. I received a letter from my partner in Los Angeles while I was in Sonora, asking me to stop off at Phœnix on my way home and see Mr. Ward relative to the sale of his ranch; also to look up in Sonora in regard to cattle. I stopped off here on my way back, and Mr. Ward said he had just that morning received a letter from Mr. Hollingsworth saying I would be here soon.

Q. Where did you see Ward?

A. I saw him at Mr. Goldman's or Goldberg's store over here; or it may have been at the livery stable first about a block or so down here, but I think at the store.

Q. Will you state what took place. What did you say to Ward?

A. I said to Mr. Ward I had a letter from my partner in Los Angeles asking me to look up some cattle ranges here, and my partner had written he had written to Mr. Ward and for me to see him.

113 I asked him if his ranch was for sale and he said it was. I asked him his price and he told me.

Q. What did he say?

A. $30,000. I asked him to put it down in writing so I could state exactly what it was. We did so. I did the writing and Mr. Ward told me what to put down. I asked him then if he hadn't better put it in typewriting. He said yes, and I had that done and Mr. Ward read it over afterwards and he signed it.

Q. Where did this transaction occur?

A. This occurred in the rear of Mr. Goldman's or Goldberg's I don't know which the name is—on the corner over there. In the rear of his store.

Q. Did you go out to his range to know what he had?

A. No, sir; Mr. Ward said he was going back to his range that afternoon, and that there was some of the cattle he had sold was out here on a ranch somewhere just outside the city. I said I would like to see them, as long as I didn't go to the range; so I hired a livery and he led his horse behind and we drove out that far.

Q. Which way was that from here? Was it north, east, west or south?

A. I don't know which are the points of the compass here.

Q. You are facing pretty nearly north?

A. Then it would be northeast. We met Mr. Norton on the road—I think the gentleman on the stand here a moment ago—
114 and he told me about the cattle, and Mr. Ward showed me the cattle, and I took photographs of them in the field. Those Mr. Ward said he had sold to Mr. Norton.

Q. You say he made a statement of this to you?

A. Yes, sir.

Q. Have you got such a statement now?

A. Yes, sir.

Q. Is it in writing?

A. Yes, sir.

Q. Will you produce it?

(Witness produces paper and hands it to counsel.)

Q. Is that the statement he made at the time?

A. Yes, sir.

Q. Whose signature is that to it?

A. Mr. Ward's signature.

Q. Whose is that last?

A. Myself as witness.

Q. Now, before offering it, just hand it to the other counsel.

(Witness hands paper to Judge Kibbey.)

Q. Do I understand you that Mr. Ward signed that in your presence?

A. Yes, sir.

Mr. AINSWORTH: We now offer it in evidence.

There being no objection same was filed as Defendants' Exhibit No. 4.

Witness excused.

115 Mr. JOSEPH MONIHON, a witness called on behalf of defendant and duly sworn, testified as follows:

Direct examination.

By Mr. AINSWORTH:

Q. Where do you reside?
A. Phœnix.
Q. What is your business?
A. Stock dealer and rancher.
Q. Do you know J. M. Ward?
A. Yes, sir.
Q. He is in the cattle business, too, is he?
A. Yes, I believe so.
Q. Your business, as I understand, is running a ranch and feeding cattle, buying and selling and handling range cattle?
A. Yes, sir.
Q. Did you purchase any cattle from Mr. Ward during this year?
A. Yes, sir.
Q. How many?
A. I can't tell you exactly. I think some place about 100 head.
Q. Do you know what they came to?
No, sir.
Q. What you paid him?
A. No, sir; I don't know right now.
116 Q. Can't you get at it exactly? Don't you know how much you paid him per head?
A. Yes, sir. I paid him, I believe, $15 for yearlings—I don't know as there were but few yearlings. There might be a few ones, $15, $18, and $21.50, I think—$21.50 for threes, I paid.
Q. How many yearlings, did you get?
A. I couldn't tell you.
Q. Do you know how much money you paid him or agreed to pay him, all told?
A. I couldn't tell you right now.
Q. Can you get that?
A. There was a few more of twos than there was of threes.
Q. Haven't you got the statement?
A. I think it is home in my books. I have got the amount I paid him when I settled with him. It's on my books.
Q. Can't you tell how much you paid out this year to Ward?
A. Not unless I look at my book.
Q. Was it $50?
A. It was a whole lot more than that—100 head of cattle would amount to a great more than that much. It amounted to something like, I think, between $1700 and $2,000; right around there; about 100 head of cattle at that price would amount to about that much. I think it was between $1700 and $2,000.
Q. How can you get at it exactly and tell us?
117 A. I can't get at it unless I had my book.
Q. When can you get your book?

A. It's out at the ranch.

Q. Can't you produce it this afternoon so we can get at it exactly?

A. I think I could.

Q. Did you buy any of him last year?

A. No, I didn't. I bought from another party, a party Mr. Ward sold to.

Q. Who was that, do you know?

A. I forget his name—them Texas men.

Q. Garrett Company?

A. Yes. Norton and I bought them from him after he bought them from Ward.

Q. Can you tell me whether you bought any in 1897 or not?

A. I don't hardly think I did. It might possibly be a few head, if he had them up here, strays that come in, I might have bought anywhere from three to ten head. I wouldn't be positive.

Q. Do you have any recollection of purchasing any cattle except this year and last year?

A. From him and Crowley—Crowley last year.

Q. You never bought any from him excepting this year?

A. No, sir; not that I know of.

Q. How many two-year-olds in this bunch, if you know?

118 A. As a general thing the two-year-olds runs more twos than threes. I don't think I had over five or six cows. He had some bulls; maybe in the neighborhood of five to six or eight or nine; but cows and bulls, I think the cows were $15, and bulls I don't recollect how much I did pay; I think $12 or $14; but the steers I think was $18 and the threes was $21.50. There was more twos than threes, but the number I don't think I have got it on my book. I just put down the whole amount.

Q. It run from $1700 to $2,000?

A. I think just about that; yes, sir.

Q. You can give us the amount exactly? I wish you would do so.

A. I can't now.

Q. I mean hereafter.

A. It might possibly be more, but I don't think it is. The best of my recollection is between $1700 and $2,000; but it might have run to $2,000. The twos will come—yes, it would certainly be over $1800; but then there was a few under that—it would probably run around about $1,900. I wouldn't want to be positive about it.

By the COURT:

Q. What time this year was that?

A. I think the latter part of June or July. I think it was June.

Q. Some time before the first of July of this year?

A. Yes, sir.

Witness excused.

119 Mr. M. H. SHERMAN, defendant, called on his own behalf and duly sworn, testified as follows:

Direct examination.

By Mr. AINSWORTH:

Q. You are one of the defendants?
A. Yes, sir.
Q. Where do you reside?
A. Los Angeles, California.
Q. You are acquainted with the Sherman-Hardenburg Cattle Company and Dave Hardenburg?
A. Yes, sir.
Q. And Mr. Ward?
A. Yes, sir.
Q. Will you state how you became to be the owner, that transfer of the property from the Hardenburg Cattle Company or Hardenburg to you—who are the stockholders in that company first?
A. David Hardenburg and myself.
Q. Who purchased the property originally from Mr. Ward?
A. David Hardenburg.
Q. Were you present at the time of the purchase and the transfer and the making of the notes?
A. Yes, sir.
Q. Where was that?
A. Up here in the Anderson block in this city.
120 Q. At my office?
A. Yes, sir.
Q. Mr. Ward, yourself and Mr. Hardenburg were there?
A. Yes, sir.
Q. What, if any, money did you pay personally, yourself?
A. I paid $9,500 at the time to Mr. Ward.
Q. What other money?
A. I also——
Q. How much did you pay to Ward?
A. I paid him $8,000 in interest.
Q. That is the interest mentioned by him on the back of the notes?
A. Yes, sir.
Q. How was your money paid, if you recollect?
A. I don't remember all the particulars. It was paid through Hardenburg. I know I gave Hardenburg a good — of other money. He had his work stock and other things there, and I gave Dave $2,000 or $3,000 more for other things which he got of Mr. Ward around there—some saddle animals, and I don't know that all it might be—stock and other things there that Mr. Ward charged extra for.
Q. What became of that property?
A. It was turned over by Mr. Hardenburg to the Hardenburg Cattle Company, and it was occupied by the Hardenburg Cattle Company from that time on.

121 Q. Who did the Desert Wells belong to?

A. The Desert Wells and those cattle there belonged to me.

Q. And the HB brand, whose brand was that?

A. It was Dave Hardenburg's brand.

Q. What did the Hardenburg Company do with the property afterwards?

A. They mortgaged this property, or Mr. Hardenburg mortgaged this property back to Mr. Ward, and then sold it to the Hardenburg Cattle Company subject to the mortgage, and it remained in that shape until after we made a contract which has been referred to here, and even then it remained the same because there was nothing done; and finally the Sherman-Hardenburg Cattle Company transferred all the property to me in consideration of the $9,500 above mentioned, or mentioned previously, and something like $3,000 again, and something like $5,000 another time, and $8,000 interest on it, that I paid.

Q. That is the whole amount you put into it—did Hardenburg ever put any money into it at all?

A. Dave put in his cattle and his ranch.

Q. And it was all transferred back to you?

A. Yes, sir.

Q. Then what became of the property after it was turned over to Ward—I mean when the property was turned back to Ward; the stock and stuff on the range, what had become of it, if you know?

122 A. Ward has been in possession of the property since September, 1894, as I understand it.

Q. Have the notes ever been delivered up to you?

A. No, sir.

Q. Nor the mortgage conceled?

A. No, sir.

Cross-examination.

By Mr. KIBBEY:

Q. Did you have any part in the purchase of these cattle from Mr. Ward?

A. I was around there when Dave was talking.

Q. You advanced some money on the purchase-money?

A. Yes, sir.

Q. These notes were given for the deferred payments, were given by yourself and Dave Hardenburg as a part of that transaction?

A. I understood Dave gave these notes to Mr. Ward as a balance still due on the property; and Dave told me that he had agreed I should guarantee them, which I did in full, principal and interest.

Q. When was it understood then that the Hardenburg Cattle Company, or whatever it was named, was to be organized?

A. I don't know. Dave and I talked it over. Dave wanted me to guarantee these notes and advance him some money so he could

buy this property; and then I guess afterwards we did dis-
123 cuss the propriety of an organization.

Q. Who advanced the money to Mr. Ward, the $9,500?

A. I gave Dave $9,500, and he said he was going to give it to Mr. Ward.

Q. Prior to that time had you any arrangements with Mr. Hardenburg in reference to the organization of the company?

A. I don't know. Dave came down and talked to me about it.

Q. Were you indebted to Mr. Hardenburg in anywise at that time?

A. No, sir.

Q. As a part of that transaction didn't you give your own personal check to Mr. Ward for $5,000—deliver it personally?

A. I don't remember.

Q. On the Valley bank?

A. I don't remember.

Q. And that $4,500 was paid afterwards?

A. I don't remember.

Q. You were interested in this transaction, weren't you?

A. I think I have explained it pretty fully previously.

Q. Didn't you go up to the ranch before the purchase was made and look over the ranch?

A. I don't remember whether it was before or not. I went up with Dave and looked it over.

Q. What was the purpose of that?

A. Dave wanted me to endorse these notes and do certain
124 things, and he asked me to go.

Q. How long after that purchase was it the Sherman-Hardenburg Cattle Company was organized?

A I don't remember.

Q. Soon or late?

A. Some time after that. I don't remember.

Q. Soon or later?

A. I don't remember exactly about that. It was somewhere about there.

Q. You yourself have no personal knowledge as to what Mr. Ward got back under this agreement?

A. I wasn't there.

Q. It passed under your immediate observation?

A. I wasn't there.

Q. Then you don't know personally what was delivered back?

A. I wasn't there.

Q. Wasn't the understanding at the time these cattle were being purchased and the negotiations going on for them, that you took part in the negotiations?

A. I don't think so. Dave came down and told me he had been making some trades around there and wanted me afterwards—I don't know when—to go and look at it. We had more or less talk about it.

Q. Do you mean us to understand you just simply advanced

$9,500 and endorsed these notes without any previous talk with Dave about it?

125 A. I don't think you understand what I said. I said Dave bought this property and afterwards came to talk with me about it and wanted me to endorse these notes and so on; and I finally consented to do it, and did it.

Q. You also advanced him this money?

A. Dave did the buying and I advanced him some money.

Witness excused.

Defendant rests.

Mr. KIBBEY: I think, your honor, we are entitled to a judgment for the amount we claim on this evidence.

The COURT: Have you got in all the evidence you want in? If so I will hear you respectively.

Mr. KIBBEY: I desire to introduce this paper—it is the agreement that I referred to.

Mr. AINSWORTH: We object as it is only executed on one part, and it is not signed by Mr. Ward in any particular. I don't want a contract put in there that is going to bind one and not the other. I object to it on the ground it has an interlineation in there after the contract was made, and written by a different hand. I will put Mr. Ward on the stand and ask him if he didn't write that.

The COURT (reading from paper referred to): Excepting only from the provision of said conveyance such cattle as shall have been sold and delivered.

126 Mr. AINSWORTH: I will ask Mr. Sherman if that was in there before he signed it.

Mr. SHERMAN: That is not my handwriting. That was not in there when I signed it.

The COURT: Was "second" scratched out and "first" in when you signed it?

Mr. SHERMAN: That was not in there when I signed it.

Mr. KIBBEY: I will ask Mr. Ward about it.

Mr. J. M. WARD recalled on behalf of plaintiff.

By Mr. KIBBEY:

Q. Look at that paper, and if any changes have been made after it was delivered to you indicate what it was?

A. (Referring to paper.) No, sir; that was partly written out by myself in Oroville and given to Judge Ainsworth, and he took it and went to San Francisco with it, and I heard Mr. Sherman—in fact the note accompanying it said they changed it a very little, and this is what they returned to me just as you see it.

Q. Was that interlineation in there at that time?

A. Everything was in there as you see it; nothing in that did I change.

Cross-examination.

By Mr. AINSWORTH:

Q. Did you not write a letter yourself, saying you had changed it?

127 A. No, sir.

Q. Is that your handwriting (handing paper to witness)?

A. That was the contract I sent to you; that was when you was at Oroville.

Q. Is that date right—December? Was I in Oroville in December?

A. I don't know the date now. The contract I gave to you in Oroville myself.

Mr. AINSWORTH: I never saw you until you came down here afterwards.

A. That was the one I gave you in Oroville.

Q. How did you sign that? There is your signature to the carbon.

A. I don't think I had any carbon.

The COURT: Let me see that one (paper handed to the court).

Mr. AINSWORTH: We object to it on the ground that it was changed after we signed it.

Objection overruled and exception taken by defendant.

Same filed as Plaintiff's Exhibit "B."

Mr. AINSWORTH: I want to identify this paper, the letter (handing paper to witness Ward).

Mr. KIBBEY: I now offer this carbon copy in evidence.

Mr. AINSWORTH: This is my paper.

Mr. KIBBEY: I ask that he produce it.

128 Mr. AINSWORTH: I will produce it if you let me explain how I got it. I want to mark this letter.

Recess till 1.30 p. m.

1.30 P. M.

Mr. M. H. SHERMAN, recalled by plaintiff for further cross-examination, testified as follows:

By Mr. KIBBEY:

Q. You said this morning, General, that you had taken an assignment of all the interest of David Hardenburg and the Sherman-Hardenburg Cattle Company—was that assignment in writing?

A. Yes, sir.

Q. Have you it?

A. Yes, sir.

Q. In your personal possession or the attorney's possession?

A. Dave was over to California and we went over the whole thing, how much money they owed me and all that kind of thing, and Dave and I agreed on a settlement, and I had to send Dave down there a paper embodying the agreement; in the first place all the stock was to be turned over—Dave had to get it together, you know.

Q. What do you mean by that?

A. Dave had part of the stock and I had part of it.

129 Q. How did he have to get it together?

A. I don't know why he didn't have it or anything like that, excepting Dave turned me over all the stock and assigned to me all the interest he had in the capital stock and everything else.

Q. When was that?

A. Dave was in California with me some two or three months, I guess, or longer than that, I don't remember how long—it was April, 1899.

Q. I asked you a while ago if you had that paper that made that transfer to you?

A. I have got a copy of it here, and I have got an original just like it, too, signed by Dave Hardenburg.

Q. May I look at it?

A. Certainly, with pleasure. (Witness handing paper to counsel.)

Q. Where is the original of it?

A. I was careless in the whole matter. Mr. Hammond keeps my accounts and papers, and I asked him for those things and supposed I had that; and when I got over here I found I had a copy in place of the original.

Q. This was prepared where?

A. In Los Angeles.

Q. Where was Mr. Hardenburg at that time?

A. At the time we made the agreement he was in Los Angeles.

130 Q. Where was he at the time the paper was prepared?

A. Dave told me—he turned over what he had and told me to send the papers down to him in Mexico where he is now, and he would resign it and send it back to me.

Q. This was after you had been served with process in this case?

A. Why, no; that was before—this was in April. I wasn't served with process until the sixth day of May.

Q. After you had knowledge of the pendency of this suit?

A. I didn't know there was any suit.

Witness excused.

Mr. J. M. WARD, recalled on behalf of plaintiff, testified as follows: in rebuttal:

By Mr. KIBBEY:

Q. How long have you known M. H. Sherman?

A. Since about 1888.

Q. How long have you known David Hardenburg?

A. I knew Mr. Hardenburg about the same time.

Q. I wish you would just relate to the court, and relate it in its chronological order, what was said and done with reference to the purchase of your cattle by either Hardenburg or by Mr. Sherman, or if not by Sherman what Sherman did say and what relation he had to it, beginning at the beginning of it?

131 A. I think it was in the month of July, 1889, Mr. Sherman met me here and asked me to come over to the Com-

mercial hotel and take a glass of lemonade, and we sat down there and then he broached the subject that Mr. Hardenburg and he had been talking of buying my property. I made him the figures on it and he requested me to come to his house—he lived up here on the railroad—the next day; all of which I did.

Q. You mean on the car line up on Washington street?

A. Yes, sir; on Washington street. He lived to the left-hand side on the street up there about half a mile out of town, I think, or thereabouts; and I went there and he talked it over, and he said he felt favorable to the proposition.

Q. Had you seen Mr. Hardenburg up to that time?

A. No, sir. And we talked there for quite a while, and he said Mr. Hardenburg was familiar with the property. I was at that time furnishing the soldiers at Fort McDowell with beef, and I told him so, and his proposition then was that he would pay me $10,000 down and give notes and mortgage for the balance—that's what I asked. And afterwards Mr. Hardenburg come to McDowell to see me, and talked about the same way he talked. I didn't know any difference but they were both buying the property in company. And then he came from there to Phœnix, and I went over there to the range, and only two or three days after that Mr. Sherman and Mr. Hardenburg came to the ranch together, and there Mr. Sherman done all the talking, and we agreed on it, and I was to come to Phœnix and to go into this arrangement.

132 Well, as it figured out, $34,500 I believe it was then, he only wanted to pay me $5,000 down and give me, this was his own security now, his own note or memorandum, and the other $4,500 to be paid in six months, I believe it was—it was four at six months; and we entered into this agreement, and, Mr. Sherman, done all the business. Mr. Hardenburg had very little to say about it. Mr. Sherman gave me his own personal check on the Valley bank for $5,000, and this other stipulation to pay the balance.

Q. Did that $5,000 constitute part of the cash payment?

A. Yes, sir. And then—I don't recollect the number of months, but in the meantime he came to the city of Marysville and telegraphed me to meet him there——

Q. This was after the sale had been consummated?

A. Yes, sir; but before the $4,500 was paid; but $5,000 had been. And he wanted to turn me over some papers of Mr. Thomas Hine's in payment of the $4,500, but I refused to take it. When it matured he paid me $4,500—there was no interest on that. Then it went on——

Q. That constitutes the $9,500 cash payment?

A. Yes, sir; and the $25,000 in notes and mortgage was the balance; and then he defaulted, or the company did—whoever was responsible for it—in paying the $2,000 interest when it matured; and I didn't know where Mr. Sherman was and I wrote to Phœnix and received no answer; and finally some of Mr. Sherman's

133 friends—I had moved, as the mortgage provided. I had commenced to move to take possession of everything, but Mr. Sherman telegraphed me and wrote me to come to San Fran-

cisco and bring all the papers. I think then he intended to pay the whole thing—I don't know that he did; but I told him this way, and he had my letter to that effect, that no man should be fairer that I was. If he was in default by mistake I would waive the default, and I did; and he paid me the interest—that is, he sent the interest through Wells, Fargo Company to Oroville to be tendered to me. I didn't take it then, but afterwards, in San Francisco the Wells, Fargo Company paid it over to me there to be paid in Oroville, and I accepted it and endorsed it on the note. That was the first payment of interest. Then it ran on until the interest was paid in the second year, in three payments, I think as the note shows. Judge Ainsworth paid the last $900 in Phœnix here, after it matured a good while. I came here to Phœnix to see what was the trouble, and on my way down at Sacramento I received a telegram from Mr. B. N. Pratt, asking me to come to San Francisco. I received it on the cars, but I was on my way here and came on here, and Judge Ainsworth paid the money I was looking for. Then when they were about to default Judge Ainsworth came to Oroville—I think he stayed there three days, if I recollect right—and wanted an extension of time, and my answer to him was no, I wouldn't give an extension of time, and I didn't.

134 My reasons for that were these, that David Hardenburg had reported to me under the contract twice a year what he had done, how many calves he had branded, and how much stock he had sold off the range, and it footed up $27,000 that he had sold off the range, and I refused to give further time. Then Judge Ainsworth says, "You needn't move to foreclose. We're going to default. You can take what we have got in the Territory of Arizona." That was the first. Then I made an offer to him to make a large discount if they would pay me the money.

A. I offered to discount the whole paper $5,000 if they would pay the money or any proportion. He said it was out of the question entirely to talk about money; that they wouldn't nor couldn't pay any money, and for me to take what they had. And then was when we entered into this article of agreement that everything was to be delivered to me and accounted for on the first day of September, 1894.

Q. Then what was done with reference to the preparation of that agreement?

A. It's my recollection of it we blocked it out there in Oroville and he took it to San Francisco—Mr. Ainsworth—whatever it might be. I couldn't recollect it today, and I have no copy of it, but this was what they sent to me, this present agreement. So far as making any changes in it, I have no recollection in the world.

Q. To whom did you return the duplicate?

135 A. I returned one of them to Mr. Sherman, I think at San Francisco—I think so; I ain't certain about that.

Q. About when with reference to its date?

A. What?

Q. About the time of its date?

A. Oh, I think it is made the 12th of September. I ain't certain.

Q. Then when did you return it to General Sherman?
A. Immediately when I received it.
Q. It was some time during September, then, 1894?
A. I think so. I know it was before I came here.
Q. So far as you know, where is that paper that you returned to General Sherman, where has it been?
A. I think it has been in General Sherman's possession. I think so.
Q. Do you know?
A. That's my understanding of it. I don't know after it left me.
Q. You put it in the post-office and addressed it to him?
A. Yes, sir. I wouldn't say whether I sent it to Phœnix or San Francisco.
Q. You parted possession with it?
A. Yes, sir.
Q. And after that you never saw that paper until today?
A. No, sir.

Q. Now, what was done after that?

136 A. Well, Judge Ainsworth gave my boy an order to take possession of things, and I expect by his instructions it was filed. I have no recollection of ever seeing it, because I wasn't here and I wasn't well anyway.

Q. Is that the paper that was introduced here this morning?
A. Yes, sir; the paper I presume.
Q. Then what next was done?
A. He and a man named Peter Bean went up to the Sunflower range, and Thomas Keating, I think, was in possession of it—that was their report to me; and he delivered possession to them of the houses and things generally.
Q. To whom?
A. To my son, and he left Peter Bean in possession.
Q. Then what next occurred?
A. Then the Desert Wells was included in the whole thing, and David Hardenburg I seen him here in town, and he said he wasn't going to give up the Desert Wells. He said he had a homestead on them, and that the company had no right to dispose of his homestead. I went to Judge Ainsworth a good many times about it, and he gave me some kind of a written instrument, also, claiming when I got possession of everything I was to deliver up the notes. In the meantime David Hardenburg himself told me that about the 18th day of September he had delivered——

Mr. AINSWORTH: That is objected to, what Mr. Hardenburg said in this matter.

The COURT: I think he being a party, although not served

137 he had been shown here to be a party to the transaction.

Mr. AINSWORTH: He was a party to the transaction. He can only bind a codefendant. This is in the hands of a corporation. What he may say would not even bind the Sherman-Hardenburg Cattle Company, and don't bind Sherman as a grantor on this paper. We are sued on the note straight up.

The COURT: And so is Hardenburg.

Mr. KIBBEY: We are only suing on the balance due on the note.

The COURT: It is a question whether what Hardenburg would say would be evidence. The objection will be overruled. Exception taken by defendant.

A. I had heard on the outside by some parties I didn't know——

Mr. AINSWORTH: Objected to as incompetent and immaterial for any purpose.

A. I asked Mr. Hardenburg if he had sold any cattle since the first of September. He said yes he had sold Mr. Bovier 70 head and Dr. Jones 34 head.

Q. What else did he say about it?

A. I asked him if he didn't know those cattle were mine, and he said yes; and he said——

The COURT: I reckon that kind of a declaration wouldn't be binding on anybody.

Q. Did you ever see those cattle?

138 A. Yes, sir.

Q. Where did you see them?

A. I seen the Bovier cattle that he got, I think in Mr. Casey's pasture. I ain't certain about the man's name, but not more than 5 or 6 miles from this town. I went in among them.

Q. How many did you see in there?

A. I only seen 69, but parties told me it was 70 head.

Q. Were they part of the Hardenburg cattle?

A. Yes, sir; they were the diamond cattle.

Q. What were they worth?

Mr. AINSWORTH: That is objected to as incompetent and immaterial for any purpose in this case.

The COURT: Yes; why not? I will admit this subject to the objection of the defendant and take the objection under advisement. Objection overruled.

Defendant excepts.

Q. What were those cattle worth?

A. They were worth at that time, as near as I could find out, about $12 a head.

Q. 69 head at $12?

A. Yes, sir.

Q. Did you see any other cattle?

A. I learned that there was a lot of those same cattle——

Mr. AINSWORTH: That is objected to.

A. Mr. Hardenburg told me there was a lot in the Lewis

139 pasture east of mesa.

The COURT: What is this rebuttal of?

Mr. KIBBEY: I can't understand, if your honor please, just exactly their theory about this case. My own theory is that we sold

this property, took a mortgage back; we finally compromised. Now they didn't introduce any evidence of that compromise. They attempted to introduce evidence that we were mortgagees in possession. We claim we are not mortgagees in possession; that we bought that property back, and it was agreed we should have all of that property; and I am only meeting that as to that contention, as a precautionary matter. We say we concede that we did attempt to compromise, but that there should be no cattle sold after the first day of September, and we are showing that there was.

The COURT: You have sued upon a note and introduced the note and rested; and under that, had you prayed for $12,500 and interest, the court would be justified in giving you $12,500 and interest; but you only prayed for $1500. Now that is your case.

Mr. KIBBEY: Yes, sir.

The COURT: The court can render judgment for any amount under that promissory note not exceeding the prayer. That's your case. Now, this evidence looks to me as though you were now undertaking to recover upon a contract, the breach of the contract. There is no evidence now that there was a contract to deliver
140 all this stock, that which hadn't been sold and delivered by Hardenburg or the Hardenburg Company up to September first. Well, now, are you putting in this evidence to show what was due upon the promissory note?

Mr. KIBBEY: Well, not exactly that. We are proceeding upon this theory: I can't understand the defense in this case. It may be due to my dullness of comprehension. Now that note is paid or it is not. We say it is not because they didn't do what they agreed to do. We say that that note is not paid, but we are still frank enough to come to the court and say that there is only $1500 due on it. They come in and say to us, here they didn't introduce this evidence.

The COURT: This evidence would sustain an allegation for the recovery for cattle which were not delivered under the contract.

Mr. KIBBEY: Certainly. Then it might be it would also sustain our allegation that the note is due and unpaid, because we state the condition of the agreement was that upon the delivery of the property we were to give up the note; and that's why we never gave it up, because that's not been done.

The COURT: This evidence would show why you haven't given up the note?

Mr. KIBBEY: Yes, sir.

The COURT: Then we will listen to it for that purpose, under the objection. Objection overruled.

141 Defendant excepts to the ruling.

A. As I was saying, the cattle that were in Lewis' pasture east of Mesa two miles, I went to see them.

Q. When?

A. I went to see them about the—I didn't note the date in my book, but it was about the 25th or 26th, or somewheres along there; maybe the first of October. I think it was about the first of October. And the cattle was in there. I seen the

diamond cattle, and went into the pasture and counted them very carefully. I found 35 head in there. I was given to understand by Mr. Hardenburg that he had sold them to Dr. Jones. I seen Mr. Jones a very few days afterward—I don't know exactly when but it was in October.

Mr. AINSWORTH: We object to what Jones said.

Mr. KIBBEY: I am going to ask now this witness to state—Dr. Jones is dead, his house was burned, and his papers all burned. I want to show that this witness saw a bill of sale dated the 26th—I forget just the date.

The COURT: He saw it in the possession of Dr. Jones and delivered to him by Dr. Jones?

Mr. KIBBEY: He saw it in the possession of Dr. Jones delivered to him presumably by the Sherman-Hardenburg Cattle Company.

The COURT: No; that's not primal proof.

Mr. KIBBEY: I can't produce the paper, and I can't pro-
142 duce Dr. Jones.

The COURT: Well, that's assuming that any paper that this witness saw was a genuine paper.

Mr. KIBBEY: I am going to prove its genuineness by him.

The COURT: You are seeking to show now that was a genuine instrument?

Mr. KIBBEY: Yes, sir.

Mr. AINSWORTH: If the Sherman-Hardenburg Company ever did anything like that it could only be done by the officers of the company.

Mr. KIBBEY: That would be utterly useless, because we don't know that Mr. Sherman knew of it.

The COURT: Is this primary or secondary evidence?

Mr. KIBBEY: It is secondary.

The COURT: We are not ready for it.

Q. Do you know where Dr. Jones is?

A. He is said to be dead.

Q. You knew him in his lifetime?

A. Yes, sir.

Q. Did you ever at any time see in his possession a paper purporting to be signed by the Sherman-Hardenburg Cattle Company?

A. Yes, sir; I did.

Q. Do you know the handwriting of David Hardenburg?

A. I have seen considerable of it, and it looked like the handwriting of David Hardenburg.

143 Mr. KIBBEY: Here the witness is dead whom I cannot get; and there is still another fact I might have been able to prove—that the house burned up and that paper burned up with it; at least we can't get it.

Q. Now, was the signature to that written by David Hardenburg, in your opinion?

A. I think it was; yes, sir.

Q. Had David Hardenburg said anything to you about having sold cattle to Jones?

A. Yes, sir; he had.

Q. Now, then, I wish you would state what the date of that instrument was, and what it purported to transfer?

Mr. AINSWORTH: That is objected to as incompetent and immaterial for any purpose in this case.

Objection overruled, and defendant excepts.

Q. Give the date of the paper and its contents as nearly as you can?

A. I was down there and counted the cattle and met Dr. Jones right in front of the Gregory house there. I asked him about it, and he said yes he had bought the cattle and had a bill of sale.

The COURT: You were asked to detail what the paper said. If you read it you may do that.

A. Well, the date of it was September 27, 1894, and purported to be a bill of sale.

Q. State its contents as near as you can?

144 A. I didn't keep a copy of it.

Q. State as near as you can?

Mr. AINSWORTH: Did you read it yourself?

A. Yes, sir.

Q. State what it read?

A. Sold to Dr. Jones 34 cattle of the Sherman-Hardenburg Cattle Company, marked brand diamond; and I had been in and counted the cattle. The bill of sale only called for 34 head of cattle, and there were 35 head in the pasture.

Cross-examination.

By Mr. AINSWORTH:

Q. How many of the diamond brand did it say in the bill of sale?

A. It didn't state any other cattle but the diamond brand to Dr. Jones.

Q. How was that bill of sale signed?

A. It was signed by David Hardenburg.

Q. Who was it made to?

A. Dr. Jones.

Q. What was Dr. Jones' name?

A. W. W. Jones.

Q. Then it was made to W. W. Jones?

A. Yes, sir.

Q. What did it state the consideration was?

145 A. It didn't state the consideration that I recollect. I don't think it stated any consideration.

Q. I want to ask lyou if you didn't write me this letter after my being up at Oroville, bearing date the 15th, and send it to me here in Phœnix? (Handing paper to witness.)

A. I think I did.

Q. What date does that bear?
A. 15th of September.
Q. Isn't that the 15th?
A. 13th, 1894.
Q. Then I had left there at that time, had I?
A. I think you had, perhaps.
Q. Then when I was in Oroville you didn't make the trade with me, did you?
A. I think we come to the conclusion.
Q. Didn't you say there you took it under advisement, and now you accepted that proposition?
A. That was the 13th. I don't know what date you was there on. I can't tell what date exactly you was there on.
Q. Didn't you say in that letter you accepted the proposition, and I can turn the property over to your son?
A. Yes, sir.
Q. And you will be down the last part of this month?
A. Yes, sir.

Mr. AINSWORTH: We offer this in evidence.
No objection. Same filed as Defendants' Exhibit No. 5.
The COURT: What date do these instruments bear?
146 Mr. AINSWORTH: The 12th.
Mr. KIBBEY: The time fixed in the contract for the delivery is the first; I think it bears date the 12th.

Witness excused.

Mr. JAMES KEATING, called on behalf of plaintiff in rebuttal, was duly sworn and testified as follows:

Direct examination.

By Mr. KIBBEY:

Q. Where do you live?
A. Maricopa county.
Q. Do you know J. M. Ward?
A. Yes, sir.
Q. Do you know the Sun Flower range?
A. Yes, sir.
Q. Did you ever have anything to do with those cattle?
A. Yes, sir.
Q. Were you ever employed by the Hardenburg Cattle Company?
A. About four years and eight months.
Q. Do you remember some 69 or 70 head delivered to Mr. Bovier?
A. Yes, sir.
Q. What time were they delivered and sold to Mr. Bovier?
147 A. If I recollect right, it was either on the 16th—I wouldn't be sure, the 16th or 17th of September.
Q. 1894.
A. Yes, sir.

Q. Who was the manager and had the actual management?

A. Mr. Hardenburg, he started to come in to Phœnix; he was coming on his way to California and he left me in charge. He had ten days to come out. I think he left there on the date of the 15th; and he said he would go in and see if he couldn't get an extension of time, and he left me there in charge of everything. He had been in and out for three or four years there.

Q. Who had been the manager of that business?

A. He was general manager and vice-president of the company, I think; and Mr. Sherman was president. The first thing I knew Mr. Bovier came up with a letter from Dave and a bill of sale for 70 head of cattle. I went out and looked over them and we didn't have 70 head; we had 69.

Q. What was done with them?

A. I turned them over to Mr. Bovier and gave him two men for the company to drive them over.

Mr. AINSWORTH: Where is that bill of sale?

A. That I don't know.

Mr. AINSWORTH: That is in their possession. We object to the contents of these papers. These men had them.

A. If I remember right I think Mr. Bovier, I gave him the letter and the bill of sale back. It was wrote with a lead
148 pencil. I was well acquainted with Dave's writing, and I knowed it was from Dave; and I have known Mr. Bovier for years, and Mr. Hardenburg for years. I think that right—Mr. Bovier had them, and he taken both of them, the letter and the bill of sale both. It was just a word from Dave, and the bill of sale wrote out for 70 head.

Q. And you delivered 69?

A. Yes, sir, I delivered 69.

Cross-examination.

By Mr. AINSWORTH:

Q. What was the date of the letter and bill of sale?

A. On the 16th.

Q. The date of it?

A. I think so. The way I know——

Q. Isn't it a fact Mr. Hardenburg was to go to California and to be there on the 10th of September?

A. No, sir. We didn't commence rodeoing until the third day of September. Mr. Hardenburg was there until the 13th. We never moved down to the home place until the night of the 15th.

Q. Did Dave go to California at all?

A. No, sir, he didn't as far as I know, at that time I don't think. I think he went some other way when he came into town.

Q. Didn't he go back to the ranch in a few days?

A. No, sir; he never went back to the Sun Flower ranch. I got a letter in a few days to stay there and I will see that you are
149 paid; and I stayed until Mr. Ward's son came and took possession of the place.

Q. When did he come?
A. Him and a man named Bean, I think, came there about the first of September. I stayed there until they came and took possession.
Q. And they did take possession of all the property?
A. The night they came there. Of course I was looking for them every day.
Q. Do you know about how many cattle there was there?
A. No, sir.
Q. You was on the rodea that year?
A. Yes, sir; ever since about four or five months after they bought the place.
Q. Wasn't you on the rodea up to that time?
A. Yes, sir.
Q. Didn't you know what cattle they have got there?
A. No, sir.
Q. Practically how many?
A. They had 4,000 or 5,000 head, probably.
Q. What was the value of those cattle at that time?
A. At that time cattle was very low; you know cattle raise and fall. Some was selling at that time at $4 or $5 a head.
Q. What was these cattle that you turned over to Bovier wor'h?
150 A. $10 to $12 a head.
Q. Any other steers they had was worth the same value?
A. Yes, sir; they had steers on the range amounting to the same value.
Q. What kind of cattle were those?
A. Steers.
Q. How old were they?
A. From twos up to threes, I think.
Q. That is you mean they were either twos or threes?
A. Yes, sir.

Witness excused.

Mr. LEON BOUVIER, a witness called on behalf of plaintiff in rebuttal, was duly sworn and testified as follows:

Direct examination.

By Mr. KIBBEY:

Q. Where do you reside?
A. Phœnix.
Q. How long have you lived here?
A. I have been in the county about 18 years.
Q. Do you know Mr. J. M. Ward?
A. Yes, sir.
Q. Do you know David Hardenburg?
A. Yes, sir.
151 Q. Do you know Mr. Sherman?
A. Yes, sir.

Q. Do you know the Sherman-Hardenburg Cattle Company?
A. Yes, sir.
Q. Did you buy any cattle of them?
A. Yes, sir.
Q. Do you remember when you bought them?
A. Somewhere in September, 1894.
Q. How many did you buy—how many did you get?
A. I got 70 head.
Q. By whom were they delivered to you?
A. By Mr. Keating.
Q. From what place?
A. Sun Flower ranch.

Cross-examination.

By Mr. AINSWORTH:

Q. Didn't you buy these long prior to September from Mr. Hardenburg?
A. Hardenburg wanted me to come and get cattle from there a couple of months before that.
Q. Why did he want you to go there? How did you pay for them, or had you paid for them?
A. No, sir; hadn't paid for them. I was on their notes.
Q. Whose notes?
A. The company.
152 Q. At the company's request?
A. Yes, sir.
Q. He wanted you to come and get them when?
A. He said he couldn't sell any cattle and couldn't pay the note. The note was due and he wanted me to pay the note and take cattle for it.
Q. When was that?
A. A couple of months before.
Q. Did you agree to go on his note on that condition?
A. I went on his note six months or a year before that.
Q. Why didn't you go and get them then?
A. I didn't want any then.
Q. How early was it in September you went down there; was it before Dave came down here to go to California that year?
A. Just about that time I think.
Q. Had you contracted with Dave to take these before you went up after them?
A. I told him a long time before that if he can't pay the note I will have to take cattle and feed them.
Q. That's what you did do in consideration of the note?
A. Yes, sir.
Q. You paid the note?
A. Yes, sir.
Q. Was that agreement consummated before you went up there, before the first of September?
A. Yes, sir; a couple of months before that.

153 By Mr. KIBBEY:

Q. When did you finally agree to take the cattle?
A. I take the cattle?
Q. When did you finally agree to take them?
A. I never exactly agreed to take the cattle, until when I went to get them about the 10th or 15th of September.
Q. You had talked about if before, but you said to him unless the note was paid you would have to take cattle; but you finally agreed at the time you went up to get them?
A. Yes, sir.

Witness excused.

Mr. RAMON L. ORTIGO, a witness called on behalf of plaintiff in rebuttal, was duly sworn and testified as follows:

Direct examination.

By Mr. KIBBEY:

Q. Your name is what?
A. Ramon Ortigo.
Q. Where do you live?
A. I don't understand English.
Q. You knew Dr. Jones when he was alive?
A. Yes, sir.
Q. Where were you working along in the fall about four years ago?
154 A. Four or five years ago, I don't remember.
Q. Who was you working for?
A. Dr. Jones and Davis.
Q. Do you remember some cattle known as the diamond brand?
A. Yes, sir.
Q. Do you know whose brand that was?
A. It belonged to Davis.
Q. Do you whose brand it was?
A. It belonged to Davis at that time.
Q. Hardenburg you mean?
A. Yes, sir.
Q. Did you get any cattle or gather up any cattle at that time?
A. Yes, sir.
Q. Now, tell the court as near as you can what that date was?
A. I can't recollect that time. I guess in November four or five years ago; I can't recollect.
Q. What did you do with those cattle?
A. I delivered them on a pasture there in Mesa.
Q. Whose pasture?
A. I can't remember the name, too.
Q. Lewis?
A. Yes, sir.
Q. What was done afterwards with them?
155 A. I don't know. I turned them over to Dr. Jones.

Q. At Lewis' pasture?
A. Yes, sir.
Q. How many?
A. 35 or 36; I don't remember.

Mr. AINSWORTH: No cross-examination.
Witness excused.

Mr. J. M. WARD, plaintiff, recalled on his own behalf.

Examined by Mr. KIBBEY:

Q. Subsequent to the execution of these agreements did you ever have any talk with Judge Ainsworth with reference to the delivery of those cattle?
A. Yes, sir; I did frequently.

Mr. KIBBEY: Judge Ainsworth you don't dispute your authority to talk about it? (No reply by Ainsworth.)

Q. What conversation did you have with Judge Ainsworth about ——?
A. I wanted him to settle for those cattle, and he told me frequently that he would.
Q. What cattle?
A. The Bouvier cattle and the Jones cattle; but he kept putting me off.
Q. Go ahead?
A. The day he wrote this paper for me here, I asked him
156 what about those cattle, and he said they would settle for it in some other way.
Q. Did he ever say what remedy you had and what process you should pursue?
A. He advised me once to replevin the cattle.
Q. What cattle?
A. From Bouvier and from Jones.

Mr. AINSWORTH: No cross-examination.
Witness excused.

Mr. KIBBEY: That's our case, your honor. It is understood I may insert the date of the articles of incorporation of the Hardenburg Company.
Mr. AINSWORTH: There are some things Mr. Ward has testified to that when his recollection is called to them he will remember differently. I didn't give him that order. I gave it to his boy. (Referring to paper introduced in evidence.)
Mr. WARD: I meant this paper I had in my pocket. (Producing paper.)
Mr. KIBBEY: If you meant that typewritten order, that is in evidence.

Mr. AINSWORTH: Is this what you mean? (Presenting paper to witness which reporter could not see to identify.)

A. Yes, sir; that's it. That was delivered to me and I
157 authorized my boy to take possession of it.

The COURT: What is the date of it?

A. It is September 29, 1894.

Plaintiff rests.

C. F. AINSWORTH, Esq., of counsel for defendant, called on behalf of defendant in surrebuttal, was duly sworn and testified as follows:

Direct examination.

By Mr. COX:

Q. Did you ever have any conversation with the plaintiff in this case with reference to these Bouvier cattle?

A. Yes, sir.

Q. Will you state to the court what that conversation was; how it came up, and all about it?

A. Mr. Ward came to my office, I think once or twice; I am not certain which; and stated that there was some cattle that he understood had been delivered to Bouvier by Hardenburg. I told him I didn't know anything about it; that every time I talked to Hardenburg he denied it, and I didn't know anything about it. If Hardenburg had disposed of any cattle that belonged to him, it was his business to take the cattle; that I didn't know anything about it.

As for my agreeing to pay for them, I never did; never
158 offered to pay for them, and never said anything about it, and he didn't claim for me to pay for them. He said that there was some cattle Bouvier had, and I think Jones, but I wouldn't be positive; but I remember the Bouvier cattle because he called my attention to where they were pastured. I told him then and there if those cattle belonged to him to go and take them. It was a fight between him and Bouvier.

Q. You never at any time, on behalf of Mr. Sherman, the defendant, agreed to pay him for the cattle, or recognized any claim for them?

A. No, sir.

Cross-examination.

By Mr. KIBBEY:

Q. Mr. Hardenburg had the actual management of the cattle of the company?

A. Yes, he was in charge of the range and had charge of the cattle and disposed of and handled the cattle all the time he was on the range.

Mr. COX: Do you know when that ceased?

A. I went to Oroville—I was in San Francisco on the 10th. I went up to Oroville, and got there some time in the night towards morning—it was before daylight. I stayed that day and the next day and left the next evening. I think I was in Oroville on

the 12th. Went out there in behalf of Mr. Sherman and Mr. Hardenburg. I was secretary of the company. The note wasn't then due, and there wasn't any interest due until October. I
159 went up to see if I could not make an amicable settlement with Mr. Ward. He proposed this: He said to take, I think it was, $22,000, but I won't be certain. If we would raise the whole cash $22,000, for the $27,000—there was $12,500 wasn't due and $12,500 due in October, and $2,000 interest,—he would accept the $22,000 in full payment. I told Mr. Ward at that time I didn't think it was possible to do anything of that kind; that I thought Sherman wanted to rid himself of the whole thing, and the Hardenburg Cattle Company did, and we wanted to quit. That we had lost money in it; and we talked the matter over for some time, and he says—we agreed on it, and I took down memorandums, or he made pencil memorandum as to what he thought he would do; but he didn't give me an answer then whether he would take it or not. I went back to San Francisco with his figures as to what he thought he would do, and I came on home and this letter was sent to me in Phœnix. My recollection is after I left San Francisco he sent me that typewritten contract—I am not certain whether in that letter or another one. At any rate the contracts I never saw them; they weren't prepared nor drafted by me. I gave Sherman the figures to make it on. I arrived home September 16th, that year. I know from an examination of matter I had pending here. I came on home, and shortly afterwards I got Mr. Ward's letter where he said he would accept it. While I was in Oroville he told me what he would do, I think just as he has stated it, substantially—I
160 can't remember it exactly, but substantially as he stated. I came back down here. The understanding was Dave and I was to go to San Francisco together. Dave didn't show up here when he ought to be here, on the 10th, and I went on ahead of him. I came back home here and told him what I had done, and he said all right; and always, so far as he was concerned, was perfectly willing he said.

Q. Was he here when you got back here?

A. Yes, sir. Now as to the Desert Wells, Hardenburg didn't go to California at all. After Mr. Ward came down here—he came I think twice or three times to see me about the Desert Wells. At any rate the last time he came he said that he had a chance of selling the property, and he would like a bill of sale from the company. I said I will make a bill of sale as secretary, sign it as secretary of the Sherman-Hardenburg Cattle Company, and turn it over to you. He claimed Dave had a homestead or something on it. I did give him a bill of sale and he told me afterwards that he sold the property; but I don't think he ever told me how much he got for it; in fact, I don't think he ever said how much or anything about it. He never did deliver up the notes, as he agreed to. One of them wasn't due for four years after that. I was at Oroville just two days; got in one day and stayed that day—my recollection is I went up to his house and he drove me around, and we went over across the river some places; and I left the next night.

Q. When he applied to you for a bill of sale of the Desert Wells and wanted a bill of sale, you immediately executed it for the
161 company?

A. Yes, sir; delivered the bill of sale and he took it. What he done with it I don't know. He told me he had a chance to sell it, and I understood from him that he did sell it; but he didn't tell me what he got for it. If he did I forget it.

Q. I believe you stated he never did deliver to you the notes nor cancel the mortgage nor offer to do it?

A. No. sir.

Witness excused.

Testimony closed. Case argued to the court by counsel and submitted.

I, Willis N. Tiffany, official stenographer for the district court of the third judicial district of the Territory of Arizona, do hereby certify that the foregoing (70 pages) (88) is a full, true and correct report of the proceedings had before said court, held in and for the county of Maricopa, on the 14th day of November 1899, in the cause entitled J. M. Ward, plaintiff *vs.* David Hardenburg and Moses H. Sherman, defendants (docket No. 2195), being a full, true and correct transcript of my shorthand notes taken at the trial of said cause.

In witness whereof, I have hereunto set my hand, at Phœnix, this 12th day of December 1899.

W. N. TIFFANY,
Official Stenographer, District Court,
Third Judicial District, Territory of Arizona.

162 (Endorsed:) In the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa. J. M. Ward, plaintiff, *vs.* David Hardenburg and Moses H. Sherman, defendants. No. 2195. Reporter's transcript of evidence. Filed Nov. 8, 1900. W. C. Foster, clerk.

No. 746. In the supreme court, of the Territory of Arizona. J. M. Ward, *vs.* David Hardenburg and Moses H. Sherman. Reporter's transcript. Filed Nov. 8th, 1900. Thomas Grindell, clerk. By Angie B. Parker, deputy.

163 *Index to Reporter's Transcript of Testimony.*

Witnesses for plaintiff.	Direct ex.	Cross-ex.	Redirect ex.	Recross-ex.
Ward, J. M. (recalled — rebuttal)	126			
Keating, James	130	126	155	144
Bouvier, Leon	146	148		
Ortigo, Ramon L.	150	151		
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Witnesses for defendant.				
Ward, J. M	85			
Norton, John R.	108			
Spires, J. H	111			
Monihon, Joseph	115			
Sherman, M. H.	119	122		128
Ainsworth, C. F. (surrebuttal)	157	158		

164 This article of agreement made and entered into this twelfth day of September, A. D. 1894, by and between J. M. Ward of the county of Butte, in the State of California, party of the first part, and the Sherman-Hardenburg Cattle Company, a corporation of Maricopa county, Arizona Territory, party of the second part,

Witnesseth: The said part- of the second part is indebted to the said party of the first part in the sum of $27,000 as follows, to wit: $12,500 principal due on a certain promissory note October 1st, 1894; $2,000 yearly interest on $25,000 due October 1st, 1894; also $12,500 due on a certain promissory note on October 1st, 1897; and

Whereas the said party of the second part is unable to pay to said party of the first part the said sum of $14,500 due on October 1st, 1894, and has notified said party of the first part that it will be unable to pay said sum at said time and

Whereas said party of the second part desires to deliver up and turn over to said party of the first part all of the property heretofore purchased by one David Hardenburg of the party of the first part, and for which said notes were given as a part of the purchase-money.

Now therefore, in consideration of the promises and agreements of said party of the first part, the said party of the second part hereby agrees to and with said party of the first part to
165 transfer and convey, by proper deeds of conveyance and bills of sale all of the real and personal property heretofore purchased by the said David Hardenburg of the said party of the first part; also all personal and real property owned by the said party of the second part in the Territory of Arizona, in whomsoever's name the same may now stand, to said party of the first part, and more particularly described as follows, to wit: The Sunflower cattle range in Maricopa county, Arizona Territory; all cattle, horses, mules or burros branded with either of the following brands: Diamond brand, thus: ◇; H B brand, thus HB also all wagons, mowing machines, farming implements and camp outfit, and everything pertaining to or used by said Sherman Hardenburg Cattle Company, excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman Hardenburg Cattle Company prior *or* to September 1st, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1st, 1894, shall be accounted for by the party of the second part to said party of the first part.

That in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to said
166 David Hardenburg and one M. H. Sherman two promissory notes, each for $12,500, one of which matures on October 1st,

1894, and one of which matures on October 1st, 1897, heretofore executed by the said Hardenburg and Sherman to the party of the first part; also to release the said Hardenburg and Sherman from the payment of all interest due thereon, and to cancel and discharge a certain chattel mortgage executed by the said David Hardenburg to the said party of the first party, for the purpose of securing the payment of said notes, which said mortgage is now on file and of record in the office of the county recorder of Maricopa county, in the Territory of Arizona.

In witness whereof, the said party of the second part, the Sherman Hardenburg Cattle Company, has executed these presents in its corporate name, by its president, and the said party of the first part has executed these presents the day and year first above written.

SHERMAN HARDENBURG
CATTLE COMPANY,
By M. H. SHERMAN, *President.*
J. M. WARD.

167 (*Copy of Letter from J. M. Ward Attached to Agreement.*)

Description of land in Sunflower valley to be deeded.

The west half of the northeast quarter of sec. 18, and the southwest quarter of the southeast quarter and the southeast quarter of the southwest quarter of section 7 seven.

This is the description of my commuted homestead now there is David Hardenburg's pre-emption claim that is to be deeded to me also you will see that I made some little change in your paper. One was certainly an *er-or*. I will attach this as an amendment.

J. M. WARD.

(Endorsed:) No. 746. In the supreme court, of the Territory of Arizona. Ward *vs.* Sherman, *et al.* Agreement. Filed Jan. 25th, 1901. Thos. Grindell, clerk.

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PHŒNIX, ARIZONA, *January* 8, 1900.

Received this day from J. M. Ward the Sunflower range and about 1200 cattle supposed to be running on said range and branded with the diamond brand. Also all the horses, 30 or 40, more or less, now running on the range, branded with the diamond brand. The said horses and cattle being turned over to us under and by virtue of a judgment of the district court of Maricopa county, Arizona, in the case of J. M. Ward *vs.* David Hardenburg and Moses H. Sherman.

It being expressly understood that the numbers herein mentioned are mere estimates, but estimated as nearly as said Ward can, and shall be subject to future ascertainment; and by this is meant that when we take possession of the range, we shall ascertain the actual number, as nearly as possible, and then correct this receipt to agree therewith.

M. H. SHERMAN,
By C. F. AINSWORTH,
His Attorney.

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. Ward *vs.* Sherman, *et al.* Receipt for ranch &c. Filed Jan. 25", 1901. Thos. Grindell, clerk.

169 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

Messrs. Kibbey & Edwards, attorneys for appellant:

You will please take notice that on Wednesday, January 16th, 1901, at the court-room in the city of Phœnix, Arizona, at the opening of court upon said day, or as soon thereafter as counsel can be heard, the appellee in the above-entitled action will submit to the above-entitled court the motion of which the annexed is a copy, for the decision of the court thereon.

Phœnix, Arizona, January 14, 1901.

C. F. AINSWORTH,
Attorney for Appellee.

170 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

Comes now the appellee in the above-entitled action and moves the court to strike from the files appellant's abstract of record filed herein, and to affirm the judgment of the trial court entered in this cause.

This motion is based on the following grounds, to wit:

Said abstract is not in compliance with act No. 71 of the Laws of 1897 of Arizona, in that it does not contain a succinct statement of the testimony given in the court below, in narrative form; but gives all the testimony verbatim.

Said abstract is not in compliance with the rules of this court in this that it does not contain the "minute entries of the trial court" as required by section 5, rule 10 of this court.

C. F. AINSWORTH,
Attorney for Appellee.

(Endorsed:) No. 746. In the supreme court, Territory of Arizona. John M. Ward *vs.* Moses H. Sherman, *et al.* Motion to strike out abstract of record and affirm judgment. Copy received Jan'y 15, 1901. Kibbey & Edwards, att'y- for pl't'f. Filed Jan. 15, 1901. Thos. Grindell, clerk.

171 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD Appellant,
vs.
MOSES H. SHERMAN ET AL., Appellees. } No. 746.

To C. F. Ainsworth, Esqr., one of counsel for appellee-:

Please take notice that I have filed an amended assignment of errors on behalf of the appellant in the above-entitled cause, a copy of which I hand you with this notice.

You will further take notice that on Tuesday morning at nine-thirty o'clock January 29th, 1901, I will ask an order of said court allowing the same.

Respectfully, JOSEPH H. KIBBEY,
Of Counsel for App'l'nt.

(Endorsed:) No. 746. In the supreme cr't Terr. of Arizona. J. M. Ward, *vs.* M. H. Sherman, *et al.* Service of motion to amend assignment of errors. Received copy of notice and proposed amendment this 29 Jan'y 1901. C. F. Ainsworth, of counsel for appellee-. Filed Jan. 30, 1901. Thos. Grindell.

172 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN, Appellee. } No. 746. Opinion.

Appeal from district court, Maricopa county; Webster Street, judge.

Kibbey & Edwards for appellant.
C. F. Ainsworth, Frank Cox and C. N. Sterry, for appellee.

Per curiam: The brief of the appellant in this case contains the following assignment of errors: "(1.) The court erred in admitting evidence adduced by the defendant. (2.) The court erred in rejecting evidence offered by the plaintiff. (3.) The evidence does not sustain the judgment, findings or verdict of the court. (4.) The evidence does not sustain the findings of the court. (5.) The judgment of the court is contrary to the law. (6.) The judgment of the court is contrary to the evidence." The rules of this court (rule 3) require "a specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to the admission or the rejection of evidence, the specification shall quote the full substance of the
173 evidence admitted or rejected. * * * When the error alleged is to the finding of the court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding." It is further prescribed (rule 6) that "all assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. * * * An objection to the

ruling or action of the court below, will be deemed waived here, unless it has been assigned as error, in the manner above provided."

There is objection made by counsel for the appellee to the consideration of the assignment of errors in this case, on the ground that the same does not conform to the requirement of the statute and the rules of the court. The objection is well founded. The errors assigned are but general and indefinite. They point us to nothing specific, and utterly fail to comply with the express provision of our rules. This court is an appellate one, and the prime object of these rules is the designation of specified errors, in order that the court and opposite counsel may be clearly informed of what particular ruling or action below is relied upon for the reversal or modification of the judgment. An assignment which does not distinctly point out these matters—one which compels the court and counsel to look further and to search the brief and record in order to discover them—entirely fails to accomplish the purpose of its being. Not one of the errors here alleged is sufficiently specific to be entitled to con-
174 sideration. General assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this court, and likewise by other courts operating under similar rules. Newmark *et al. v.* Marks (Ariz.), 28 Pac. 960; Christy *v.* Arnold (Ariz.), 36 Pac. 918; Main *v.* Main (Ariz.), 60 Pac. 888; Treat *v.* Jemison, 20 Wall. 652; United States *v.* Indian Grave Drainage Dist., 85 Fed. 928; Louisiana A. & M. R. R. Co. *v.* B'd Levee Com'rs, 87 Fed. 594; Chandler *v.* Pomeroy, 96 Fed. 156; Percy Consol. Min. Co. *v.* Hallam (Col.), 44 Pac. 509; Schofield *v.* Territory (N. M.), 56 Pac. 306. The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed.

GEO. R. DAVIS, *A. J.*
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*

(Endorsed:) No. 746. John M. Ward, appellant, *vs.* Moses H. Sherman, appellee. Opinion. Recorded Book 5, pages 28–29. Filed M'ch 21, 1901. Thos. Grindell, clerk.

175 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

Comes now the appellant and moves the court for a rehearing of this cause for the reason that the record itself discovers fundamental errors.

The judgment of the lower court was based upon the cross-bill of the defendant Sherman. Assuming all the facts there stated to be true it constitutes neither a defence nor a basis of affirmative relief. This is apparent upon the face of the record.

Again, when *all* the evidence has to be considered to determine whether it supports a verdict or finding it is specific as it can be made, we submit, to say that the evidence (all of it taken together) is not sufficient to support the finding. Wherein it is insufficient cannot be specified because it all must be considered. Does it in the aggregate support the finding?

It is to be remembered that there was little or no conflict of evidence. It is not a case where one or several items of conflict could be picked out and specified.

The question whether Ward the appellant was a mort-
176 gagee in possession or not is one of law apparent on the face of the pleadings and is fundamental.

The question whether the judgment of the court is contrary to law is apparent upon an examination of *all* the evidence not any specific part of it or of any part of it less than the whole—If it be conceded that Ward was a mortgagee in possession, then would not the proper judgment be that he account.

We concede the rule generally as asserted by the court. But in construing it we may advert to the reason of it when we seek to apply it. No one was misled, no one, either of court or counsel, were prejudiced or put to any extra care, trouble or labor to ascertain the errors complained of. Appellant fully stated them in the very paper embodying the assignments of error. The appellee understood them and answered the objections.

It certainly cannot be said that either the court or counsel were not apprised of the merits of dispute, plainly and distinctly called to their attention and receiving their consideration.

The enforcement of a rule when the reason for it is absent does not promote justice. It may punish the lawyer, it is true, but that is not the purpose, we submit.

If this judgment is unjust—if it is unwarranted by law—if it is against the law, then it seems to me that the court should rather seek a reason to exercise its power to do justice than to avoid a consideration of the merits of the case.

177 I, of course, do not for a moment approve of carelessness or ignorance of the lawyer—but which way should a court of justice lean?

We respectfully ask a rehearing.

JOS. H. KIBBEY,
Of Counsel for Appellant.

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. John M. Ward, *vs.* M. H. Sherman, *et al.* Motion for rehearing. Filed M'ch 23, 1901. Thos. Grindell, clerk.

In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees. } No. 746.

Precept.

The Territory of Arizona to the sheriff of Maricopa county, Greeting:

Whereas, on an appeal in the above-entitled cause, by the appellant herein, the supreme court of the Territory of Arizona, did on the 21st day of March 1901 render judgment in said cause affirming the judgment of the court below; and whereas the above-named appellant did, on the 23rd day of March 1901, and within fifteen days after the rendition of said judgment by said supreme
178 court, file in the office of the clerk of said court, its certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept.

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to Mr. C. F. Ainsworth, attorney of record for appellees, whose residence and place of business is Phœnix, Arizona, and that you make the return of this precept with your proceedings thereunder entered thereon, to this court forthwith.

Witness, the Honorable Webster Street, chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

Done at Phœnix, the capital of Arizona, this 26th day of March, 1901.

[SEAL.] THOMAS GRINDELL,
Clerk of the Supreme Court of Arizona.

OFFICE OF SHERIFF,
County of Maricopa, } *ss:*

I hereby certify that I received the within precept together with a certified copy of motion for rehearing on the 27" day of March 1901 and personally served the said certified copy of motion for rehearing on the 27" day of March 1901 on C. F. Ainsworth, attorney of record for appellee, by delivering to him in the city of Phœnix Maricopa county, Arizona Territory, the said certified copy
179 of motion for rehearing.

Dated this the 27" day of March 1901.

Fees.

To serv.....	$1.50
Mi.	.30
Total	$1.80

S. S. STOUT, *Sheriff,*
By JAS. T. GIBSON, *Dep'ty.*

(Endorsed:) In the supreme court of the Territory of Arizona. No. 746. Jan. term, 1901. John M. Ward, appellant, *vs.* M. H. Sherman and David Hardenberg, appellees. Precept. Filed March 27, 1901. Thos. Grindell, clerk.

In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

C. F. Ainsworth is the counsel for appellees and a resident of Phœnix, Arizona.

Comes now the appellant and moves the court for a rehearing of this cause for the reason that the record itself discovers fundamental errors.

The judgment of the lower court was based upon the cross-bill of the defendant Sherman. Assuming all the facts there stated to be true it constitutes neither a defence nor a basis of affirmative
180 relief. This is apparent upon the face of the record.

Again, when *all* the evidence has to be considered to determine whether it supports a verdict or finding it is specific as it can be made, we submit, to say that the evidence (all of it taken together) is not sufficient to support the finding; wherein it is insufficient cannot be specified because it all must be considered. Does it in the aggregate support the finding?

It is to be remembered that there was little or no conflict of evidence. It is not a case where one or several items of conflict could be picked out and specified.

The question whether Ward, the appellant, was a mortgagee in possession or not is one of law apparent on the face of the pleadings and is fundamental.

The question whether the judgment of the court is contrary to law is apparent upon an examination of *all* the evidence not any specific part of it or of any part of it less that the whole. If it be conceded that Ward was a mortgagee in possession then would not the proper judgment be that he account.

We concede the rule generally as asserted by the court. But in construing it we may advert to the reason of it when we seek to apply it. No one was misled, no one, either of court or counsel, were prejudiced or put to any extra care, trouble or labor to ascertain the errors complained of. Appellant fully stated them in the very paper embodying the assignments of error. The appellee understood them and answered the objections.
181 It certainly cannot be said that either the court or counsel were not apprised of the merits of dispute, plainly and distinctly called to their attention and receiving their consideration.

The enforcement of a rule when the reason for it is absent does not promote justice. It may punish the lawyer, it is true, but that is not the purpose, we submit.

If this judgment is unjust—if it is unwarranted by law—if it is against the law, then it seems to me that the court should rather seek a reason to exercise its power to do justice than to avoid a consideration of the merits of the case.

I, of course, do not for the moment approve of the carelessness or ignorance of the lawyer—but which way should a court of justice lean?

We respectfully ask a rehearing,

JOSEPH H. KIBBEY,
Of Counsel for Appellant.

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. J. M. Ward *vs.* David Hardenburg & Moses H. Sherman. Amended motion for rehearing. Filed April 2nd, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

182 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees. } No. 746.

Precept.

The Territory of Arizona to the sheriff of Maricopa county, Greeting:

Whereas, on an appeal in the above-entitled cause, by the appellant herein, the supreme court of the Territory of Arizona, did on the 21st day of March 1901 render judgment in said cause affirming the judgment of the court below; and whereas the above-named appellant did, on the 2nd day of April, 1901, and within fifteen days after the rendition of said judgment by said supreme court, file in the office of the clerk of said court, its certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept.

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to C. F. Ainsworth, attorney of record for appellees, whose residence and place of business is Phœnix, Arizona, and that you make the return of this precept with your proceedings thereunder entered thereon, to this court forthwith.

183 Witness, the Honorable Webster Street chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

Done at Phœnix, the capital of Arizona, this 2nd day of April, 1901.

[SEAL.] THOMAS GRINDELL,
Clerk of the Supreme Court of Arizona,
By ANGIE B. PARKER, *Deputy.*

OFFICE OF SHERIFF,
County of Maricopa, Arizona Territory, } ss:

I hereby certify that I received the within precept together with a certified copy of motion for rehearing on the 3" day of April, 1901,

and personally served the said certified copy of motion for rehearing on the 4″ day of April, 1901, on C. F. Ainsworth, attorney of record for appellees by delivering to him in the city of Phœnix, county of Maricopa, Arizona Territory the said certified copy of motion for rehearing.

Dated this the 4″ day of April, 1901.

S. S. STOUT, *Sheriff*,
By W. A. MOEUR, *Deputy*.

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. No. 746. January term, 1901. J. M. Ward, appellant *vs.* M. H. Sherman, *et al.* appellee-. Precept. Filed April 5th, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

184 In the Supreme Court of the Territory of Arizona.

J. M. WARD and THE UNITED STATES FIDELITY AND GUARANTEE Company, Appellants,
vs.
MOSES H. SHERMAN, Appellee.

Bond.

Know all men by these presents, that we J. M. Ward and The United States Fidelity and Guarrantee Company, as principals, and Leo Goldman, Charles Goldman, Frank Creswell and James Bark, as sureties of the county of Maricopa, Territory of Arizona, are held and firmly bound unto Moses H. Sherman in the just and full sum of twenty thousand (20,000) dollars, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these present-.

Sealed with our seals and dated this 29th day of November, 1901.

The condition of the above obligation is such that;

Whereas lately at a session of the supreme court of the Territory of Arizona in a suit in said court between J. M. Ward as appellant and Moses H. Sherman as appellee, a final judgment was entered against the said J. M. Ward and against the said United States
185 Fidelity and Guarrantee Company as surety upon the appeal bond of the said J. M. Ward, and the said J. M. Ward having obtained an allowance of appeal to the Supreme Court of the United States to reverse the said judgment and decree in the aforesaid suit.

Now therefore the condition of this obligation is such that if the said J. M. Ward shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. M. WARD.
By KIBBEY & EDWARDS,
His Attorneys.
JAMES BARK.
CHAS. GOLDMAN.
LEO GOLDMAN.
F. L. CRISWELL.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Leo Goldman, Charles Goldman, Frank Criswell and James Bark the sureties in the foregoing bond being first duly sworn on oath say, each for himself and not one for the other, that he is a resident and a freeholder of said county of Maricopa and is worth the sum of ten thousand dollars in property within said Territory of Arizona over and above his just debts and liabilities and over and above his property exempt from execution.

JAMES BARK.
CHAS. GOLDMAN.
F. L. CRISWELL.
LEO GOLDMAN.

186 Subscribed and sworn to before me this 29th day of November, 1901.

My commission expires Jan. 23rd, 1904.

[SEAL.] WILLIAM P. RICHARDSON,
Notary Public.

The foregoing bond is approved this 10th day of December, 1901.

RICHARD E. SLOAN,
Asso. Justice, Presiding.

(Endorsed:) No. 746. In the supreme court, of the Territory of Arizona. J. M. Ward *vs.* David Hardenburg, *et al.* Bond on appeal. Filed Dec. 2nd, 1901. James A. Cox, clerk.

187 In the Supreme Court of the Territory of Arizona.

J. M. WARD, Appellant,
vs.
DAVID HARDENBURG and MOSES H. SHERMAN, Appellees. } No. 746.

Be it remembered that on Friday, November 9th, 1900, that being one of the juridicial days of the November term, 1900, of said court, the following record of this case was made for this day, to wit:

Title of Cause.

On motion of Mr. Jos. H. Kibbey, attorney for appellant herein, it is ordered that he have thirty days in which to file briefs.

On Monday, January 14th, 1901, that being one of the juridicial days of the January term, 1901, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

It is ordered that the hearing of this cause be set for January 24th, 1901.

188 On Thursday, January 17th, 1901, that being one of the juridicial days of the January term, 1901, of said court, the following record in this case was made for this day, to wit:

Title of Cause.

On motion of Mr. A. J. Edwards, attorney for appellant herein, it is ordered that action on motion of appellee to strike out abstract and affirm judgment, be deferred until Tuesday, January 22nd, 1901.

On Friday, January 25th, 1901, that being one of the juridicial days of the January term, 1901, of said court, the following record in this case was this day made, to wit:

Title of Cause.

On motion of Mr. Jos. H. Kibbey, attorney for appellant herein, it is ordered that Mr. E. J. Edwards be entered as associate counsel.

(Also the following order)

Title of Cause.

This cause coming on for hearing was argued by Mr. Jos. H. Kibbey and E. J. Edwards for appellant and Mr. C. F. Ainsworth and Mr. C. N. Sterry for appellees, and cause ordered submitted.

On motion of Mr. Jos. H. Kibbey, it is ordered that appellant have permission to file supplemental brief herein.

189 On Tuesday, January 29th, 1901, that being one of the juridicial days of the January term, 1901 of said court, the following record in this case was made for this day, to wit:

Title of Cause.

On motion of Mr. Jos. H. Kibbey, for appellant, it is ordered that he have permission to file motion to amend assignment of errors.

On motion of Mr. C. F. Ainsworth, attorney for appellees herein, it is ordered that he have permission to file briefs on motion to amend statement of facts.

On Wednesday, January 30th, 1901, that being one of the juridicial days of the January term, 1901 of said court, the following record in this case was made for this day, to wit:

Title of Cause.

It is ordered that the motion to amend assignment of errors be and the same is hereby denied.

On Thursday, March 21st, 1901, that being one of the juridicial days of the January term, 1901, of said court, the following record in this case was this day made, to wit:

Title of Cause.

This cause having been heretofore submitted and by the
190 court taken under consideration and the court having considered the same and being fully advised in the premises: it is ordered that the judgment of the district court be and the same is hereby affirmed.

It is further ordered that the appellee herein, Moses H. Sherman, do have and recover of and from J. M. Ward, the appellant here, and The United States Fidelity and Guaranty Company, a corporation, surety on supersedeas bond herein, the sum of $17,173.50, with interest thereon from the 2nd day of December, 1899—date of judgment in the district court—at the rate of 7 per cent. per annum, together with his costs in this court, taxed at — dollars, and his costs in the lower court in this cause incurred, taxed at the sum of thirty-six and 65/100 ($36.65) dollars.

On Friday, November 1st, 1901, that being one of the juridicial days of the November term, 1901, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

It is ordered that the motions for rehearing, filed herein by appellant, be submitted.

On Saturday, November 2nd, 1901, that being one of the
191 juridicial days of the November term, 1901, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

In this cause it is ordered that the motion for rehearing filed herein by appellant, be and the same is hereby denied.

(And also the following order)

Title of Cause.

In this cause Mr. Jos. H. Kibbey, attorney for appellant in open court gave notice of appeal from the judgment of this court to the Supreme Court of the United States, and moved the court that it fix the amount of the bond on appeal and that the remittitur be stayed, whereupon, it was ordered by the court that the amount of the cost bond on appeal be fixed in the sum of one thousand dollars, and that the remittitur herein be stayed until the January term, 1902.

On Wednesday, January 29th, 1902, that being one of the juridicial days of the January term, 1902, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

On motion of Jos. H. Kibbey, Esq., attorney for appellant herein, it is ordered that he be granted 30 days to prepare transcript of evidence.

192 On Wednesday, March 19, 1902, that being one of the juridicial days of the January term, 1902, of said court, the following record in this case for this day was made, to wit:

Title of Cause.

It is ordered that the statement of facts applied for by J. M. Ward, appellant herein, be allowed and signed.

193 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

The above-named appellant considering himself aggrieved by the judgment entered on the 21st day of March 1901 in the above-entitled proceedings doth hereby appeal from said judgment to the Supreme Court of the United States and he prays that this appeal be allowed and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

ARTHUR J. EDWARDS,
Attorney for Appellant.

And now to wit on the 19th day of March 1902, it is ordered that the appeal be allowed as prayed for.

RICHARD E. SLOAN,
Presiding Judge of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. J. M. Ward, appellant, *vs.* Moses H. Sherman and David Hardenburg, appellees. Allowance of appeal. Filed March 19, 1902. James Allen Cox, clerk.

194 In the Supreme Court of the Territory of Arizona.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

Statement of Facts.

The above-entitled cause having been argued and submitted to this court at the January, 1901 term thereof, and the judgment appealed from having been on the 21st day of March, 1901, in all things affirmed by this court, and a motion for a rehearing having

been filed by the appellants, and the same having been overruled, and the appellants desiring to prosecute an appeal to the Supreme Court of the United States from the judgment of this court in the case, and having applied for the statement of facts in the case in the nature of a special verdict pursuant to acts of Congress in such case made and provided.

Now, therefore, this court on this 19th day of March, 1902, the same being a day of the January term of said court, make and file the following statement of facts, to wit:

I.

The appellant on the 8th day of November 1900 filed in the office of the clerk of the supreme court of Arizona the record
195 of this cause which included the transcript of "the testimony taken in the case transcribed and certified by the court reporter" as permitted by section 1 of act No. 71 of the Laws of 1897, which transcript of the testimony so transcribed and certified is as follows;

(See Reporter's Transcript, pages 74–162.)

During the trial the following exhibits were introduced as evidence by the plaintiff, being Plaintiff's Exhibits A and B.

(For Plaintiff's Exhibit A, see pages 31, 32)

(For Plaintiff's Exhibit B, see pages 32–35)

The defendant during the trial of the case, introduced the following exhibits as evidence:

Exhibit 1. (See pages 36–37)
Exhibit 2. (See pages 37–38)
Exhibit 3. (See page 39)
Exhibit 4. (See pages 40–42)
Exhibit 5. (See page 42)

196 II.

The court further finds that thereafter the appellant filed in this court his brief containing the following assignment of errors:

A. The court erred in admitting evidence adduced by the defendant.

B. The court erred in rejecting evidence offered by the plaintiff.

C. The evidence does not sustain the judgment, findings and verdict of the court.

D. The evidence does not sustain the findings of the court.

E. The judgment of the court is contrary to law.

F. The judgment of the court is contrary to the evidence.

III.

The court further finds that the rule of this court, being rule 3, subdivision 2, reads as follows:

"A specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to be the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charges

of the court, the specifications shall set out the part referred to *totidem verbis* whether it be to the instruction given, or to the instruction refused. When the error alleged is to the finding of a court,
197 the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding."

Rule 6, subdivision- 1 and 3 reads as follows:

"I. All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise in the record, it must nevertheless be referred to in the assignment of errors, or it will be deemed to be waived.

"III. An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided."

IV.

This court further finds that the appellant in this case has failed to comply with the express provisions of the rules of this court relating to the assignment of errors, and the errors assigned as above specified are but general and indefinite. That none of the errors here alleged is sufficiently specific to be entitled to consideration by this court, and in the absence of a proper assignment of the errors in this case and no error appearing upon the face of the record, the judgment of the court below is affirmed.

By the court, RICHARD E. SLOAN,
198 *Presiding Judge of the Supreme Court of the Territory of Arizona.*

(Endorsed:) No. 746. In the supreme court of the Territory of Arizona. John M. Ward, appellant, *vs.* Moses H. Sherman and David Hardenburg. Statement of facts. Filed March 19, 1902. James Allen Cox, clerk.

In the Supreme Court of the United States.

JOHN M. WARD, Appellant,
vs.
MOSES H. SHERMAN and DAVID HARDENBERG, Appellees.

October term of the year of our Lord one thousand nine hundred and one.

Afterwards to wit on the 19th day of March 1902 in this same term before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said John M. Ward, appellant, by —— —— his attorney, and says that in the record and proceedings aforesaid there is manifest error in this to wit:

That the supreme court of the Territory of Arizona erred in adjudging that the assignment of errors presented to said supreme court of the Territory of Arizona was not sufficiently specific and definite, because *under* assignment C of said assignment of
199 errors calls in question the sufficiency of the evidence to sustain the judgment for the consideration of which error it was necessary to inspect all the evidence adduced at the trial without the segregation of any part thereof and no specification of any part or parts thereof as being insufficient could properly be made, as the whole must be considered together.

And further that there is error also in this:

That the supreme court of the Territory of Arizona erred in adjudging that the assignment of errors presented to said supreme court of the Territory of Arizona was not sufficiently specific and definite, because under assignment E of said assignment of errors the legality of the judgment of the trial court is brought in question and can only be determined by reference to the whole evidence presented to the trial court and no segregation or specification of said evidence or any parts thereof could be separately specified and designated, as the whole evidence had to be considered to determine that question.

Whereas by the law of the land said judgment ought to have been given for the said appellant against the said appellee and the said appellant prays the judgment aforesaid may be reversed, annulled and altogether held for nothing and that he may be restored to all things which he hath lost by occasion of the said judgment.

ARTHUR J. EDWARDS,
Attorney for Appellant.

200 (Endorsed:) No. 746. In the supreme court of the Territory of Arizona. John M. Ward, appellant, *vs.* Moses H. Sherman and David Hardenburg, appellees. Assignment of error. Filed March 19, 1902. James Allen Cox, clerk.

201 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Territory of Arizona, } ss:

I, James Allen Cox, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 200, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John M. Ward, appellant, against Moses H. Sherman and David Hardenberg, appellees, as the same remain of record and on file in said office.

Also that the citation attached hereto is the original citation issued by said supreme court of the Territory of Arizona.

In testimony whereof, I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed at the city

of Phœnix, in the Territory of Arizona, this 20th day of March, A. D. 1902.

[Seal Supreme Court of Arizona.]

JAMES ALLEN COX,
Clerk of the Supreme Court of the Territory of Arizona.

202 *Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to Moses H. Sherman and David Hardenberg, defendants and appellees, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, beginning on the second Monday of October, in the year of our Lord one thousand nine hundred and two, pursuant to an appeal taken from the supreme court of the Territory of Arizona to the said Supreme Court of the United States wherein John M. Ward is appellant and you are appellees to show cause, if any there be, why the judgment and decree rendered in said cause should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 30th day of December, A. D. 1901, and of the Independence of the United States the one hundred twenty-sixth.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

Witness the seal of said court.

[Seal Supreme Court of Arizona.]

JAMES ALLEN COX,
Clerk Supreme Court of Arizona.

Service of copy accepted this — day of ——, 190–.

[Endorsed:] No. 746. In the supreme court of the Territory of Arizona. J. M. Ward, appellant, *vs.* David Hardenburg and Moses H. Sherman, appellee-. Citation. Accept service of within citation by copy this 6″ day of Jan'y, 1902. C. F. Ainsworth, att'y for appellee-. Please sign & return. C. A. Filed Jan'y 6″, 1902. James Allen Cox, clerk.

Endorsed on cover: File No. 18,469. Arizona Territory supreme court. Term No. 286. John M. Ward, appellant, *vs.* Moses H. Sherman and David Hardenberg. Filed March 31st, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 286.

JOHN M. WARD, APPELLANT,

vs.

MOSES H. SHERMAN AND DAVID HARDENBERG.

PLEADINGS.

The character of this case, as disclosed by the pleadings, is, substantially, as follows:

1. Complaint was filed, November 28, 1894, in the district court, Maricopa county, Arizona, by John M. Ward, (of Oroville, California,) as plaintiff, against the above-named Sherman and Hardenberg, (of Maricopa county, Arizona,) as defendants; alleging, that said Hardenberg made and delivered to plaintiff his promissory note, dated August 23, 1889, at Phœnix, Arizona, for $12,500, payable on or before October 1, 1894, with interest from August 1, 1889, until paid at 8 per cent. per annum; that said Sherman, for a valuable consideration, indorsed upon said note a guaranty of its payment; that there was due on said note the sum of $1,500; for which amount, judgment was prayed, (*R.*, *2–4*).

Plaintiff also filed affidavit on attachment, setting forth the facts above recited, and, further, that the amount so claimed is a *balance* due on said note, and that its payment "is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property" (*R.*, *4*).

2. Summons issued upon the date of filing complaint, November 28, 1894, (*R.*, *3*;) but, not having been served, further process issued against defendants May 6, 1899, (about four years and five months after filing said suit,) resulting in service upon Sherman, on said last-named date, and a return of "not found" as to Hardenberg, (*R.*, *12*). The latter was never served, and did not appear in the case, (*R.*, *27*).

3. Sherman filed answer and counter-claim, praying that plaintiff be decreed to be a mortgagee in possession of certain real and personal property, (therein described); that an accounting be had; that defendant be allowed to redeem, etc.; as will more fully appear by reference to said answer and counter-claim, and the exhibits of record, filed as part of the pleadings and proceedings of record, prior to the trial of the cause (*R.*, *5–11*; *18–20*).

(The exact character of the defense and prayer for *affirmative* relief, set up in said answer and counter-claim, so called, will be more fully referred to in the further discussion of the case.)

4. The cause came on for trial, November 14, 1899, before the court, sitting without a jury; testimony was introduced on behalf of plaintiff and defendant Sherman, (*R.*, *40–84*); thereafter, December 2, 1899, the court filed its findings of fact and conclusions of law, (*R.*, *27–30*); and, on the same day, entered judgment, upon said findings and conclusions, in favor of defendant Sherman and against plaintiff; in

which judgment, said defendant, under said counter-claim, was awarded possession, as owner, of certain real estate, of large value, together with certain cattle and personal property thereon, and, in addition, a money judgment against plaintiff in the sum of $17,173.50, with interest from date at 7 per cent., together with costs, etc., (*R., 25–26*).

5. Plaintiff moved for a new trial; the same was overruled, December 30, 1899; and, thereupon, plaintiff, in open court, prayed an appeal from said judgment in its entirety, with *supersedeas* (as to so much of said judgment as decreed the payment by plaintiff of $17,173.50), to the supreme court of the Territory; which motion was granted and *supersedeas* bond given, as above, and the appeal perfected, (*R., 35–36; 38–39*).

6. The supreme court of the Territory *affirmed* the judgment of the lower court, March 21, 1901, (*R., 96–97;* Opinion, *R., 88–89*); and, thereupon, the case was brought to this court, on appeal, with *supersedeas* (*R., 94, 98*).

STATEMENT.

In order to a proper understanding of the case, it is important to carefully consider the facts involved. With those facts established, there should be but little difficulty in correctly applying the law.

The facts, in the main, are not seriously controverted, and are, as follows:

1. On August 23, 1889, Ward, then and for many years prior thereto *owner* of a cattle range in Maricopa county, Arizona, known as the "Sunflower," together with certain cattle and stock thereon, implements, etc., sold the same to said Hardenberg, for $34,500; of which amount $9,500 was subsequently paid in cash, and the balance, namely, $25,000,

was represented by two promissory notes, each, dated as aforesaid, for the sum of $12,500, one payable on or before October 1, 1894, and the other on or before October 1, 1897, with interest from October 1, 1889, until paid, at the rate of 8 per cent. per annum. Each note was signed by Hardenberg as maker, and the payment guaranteed by the above-named Sherman, by indorsement on the back of each thereof (*R., 18, 20, 69, etc.*).

2. On the same date, and as part of the transaction, Hardenberg made, executed, and delivered to Ward a mortgage upon said real and personal property, to secure the payment of the two notes above described, representing the balance of purchase-money, as above (*R., 8–11*).

3. Subsequently, Sherman and Hardenberg organized a corporation, under the laws of Arizona, under the name "The Sherman-Hardenberg Cattle Company;" Sherman and Hardenberg being the only stockholders therein; and, thereupon, Hardenberg conveyed all of the property aforesaid, subject to said mortgage, to said Cattle Company (*R., 63–64*).

4. The interest on the above notes was paid up to October 1, 1893 (*R., 4, 18, 48, 63*).

It is claimed by Sherman that he personally furnished the moneys to Hardenberg to make said interest payments, amounting, in all, to $8,000, (*R., 63*); but this fact is not important, inasmuch as Sherman guaranteed the payment thereof, as above, (*R., 4, 18*).

5. It appears that the Cattle Company lost money in its venture; and, in September, 1894, the first of said two notes, as well one year's interest on both notes, being about to fall due, (October 1, 1894), Sherman and Hardenberg sent the

secretary of the company, (C. F. Ainsworth), to see Ward, at Oroville, California, for the purpose of effecting, if possible, an amicable adjustment and settlement of said indebtedness.

In that conference said secretary advised Ward that the company could not pay the money; that Sherman wanted to rid himself of the whole thing, as did the company; that they had all lost money in it and "wanted to quit;" and, accordingly, it was proposed to Ward that he take back all the property the company had (*R., 70, 82, 83*).

6. Said negotiation resulted in articles of agreement, entered into September 12, 1894, between Ward and the Cattle Company, the latter acting therein by Sherman as president thereof, as shown by the signature to said agreement (*R., 20, 86*).

Attention is particularly asked to this fact, as one of importance in the light of subsequent events and of the effort made by Sherman, in this case, to ignore said agreement, which he had personally signed, as above.

By the terms of that agreement, it was provided, that the Cattle Company should, within thirty days from the date thereof, transfer, convey and deliver, by proper deeds of conveyance and bills of sale, *all* of the real and personal property, so theretofore purchased from Ward by Hardenberg, as hereinabove described; as well, also, all other real and personal property owned by said Cattle Company, in Arizona, including, particularly, the cattle, stock and implements thereon, excepting therefrom only such cattle as had been *sold and delivered* by the Cattle company *prior* to September 1, 1894; all stock and cattle sold subsequent to said last-named date to be accounted for by said Cattle Company to Ward.

And, in consideration that the Cattle Company convey and deliver, within the period, as above, Ward agreed to deliver to Hardenberg and Sherman the two promissory notes afore-

said, and to release said individuals from the payment of all interest due thereon, as well, also, to cancel and discharge the mortgage theretofore executed by Hardenberg to Ward, as above (*R., 18–20; 85–86*).

7. The Cattle Company, by letter from its secretary, addressed to Ward, dated September 29, 1894, authorized the latter to enter upon and take possession of all its said property, "in accordance with and as described in" the agreement aforesaid (*R., 22*); and, thereupon, Ward took possession thereof, as so thereunto lawfully authorized (*R., 22, 49, 71, 82*).

The Cattle Company executed a bill of sale to Ward, covering certain personal property not embraced in the original mortgage, known as Desert Wells (*R., 21, 83*).

It appears, however, that the company did not transfer and convey to Ward the title to said real estate, as it had agreed to do, in the settlement, above mentioned, nor the live stock and other personal property therein described, nor did it deliver, or account to him for, certain of the stock cattle, as hereinafter stated (*R., 8, 19, 26, 28–29, 64*).

8. Under the terms of said agreement, Ward was entitled to an accounting for all stock sold and delivered by the Cattle Company, subsequent to September 1, 1894. It developed, however (as claimed by Ward), that 104 head of cattle to which he was entitled, under said agreement, had been sold from the range by Hardenberg, about the middle of September, 1894; without accounting therefor (*R., 72–80*).

Upon learning of said fact, Ward brought the matter to the attention of Hardenberg, who admitted it (*R., 72*), and likewise to the attention of said secretary of the company; and Ward, accordingly, made demand for settlement for said cattle, although without result (*R., 81–82*).

9. Under these facts, and having gone into lawful possession of the property, as owner, under the arrangement above referred to, but being unable to obtain any settlement from the company for the value of said cattle, Ward brought suit, November 28, 1894, upon one of said notes, against Hardenberg, as maker, and against Sherman, as guarantor, seeking to recover, not the principal nor interest, but an unsecured *balance* of $1,500 claimed to be due thereon (*R., 1, 4*); and this upon the theory that the transaction and agreement above mentioned adjusted and settled the matters between said parties to the extent said agreement had been carried out and performed by the Cattle Company, but not settled as to the value of said 104 head of cattle, which Ward estimated at $1,500, as above, and for which amount he brought suit (*R., 1, 40–42, 73*).

In this connection, and as showing that there was no abandonment or rescission of the agreement of settlement by Ward, attention is called to the affidavit on attachment, in which Ward set forth that the amount claimed "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R., 4*).

10. This suit was filed November 28, 1894 (*R., 1*), but service was not had upon Sherman until May 6, 1899 (*R., 12*), and was never had upon Hardenberg, nor did the latter appear in the action (*R., 12, 25*). During said period, covering nearly five years, Ward continued in the full and undisputed ownership and possession of said cattle range and property solely under the agreement aforesaid, and exercised full and complete rights of ownership in respect thereof, without notice or claim of any kind or character whatsoever, of any adverse title on the part of any one.

11. Having been served with process, as above, defendant Sherman filed answer and counter-claim, (so called,) May 16, 1899, in which were set forth, in substance, the foregoing

facts; but, in addition thereto, it was alleged that, notwithstanding said agreement of settlement, plaintiff had failed to carry out his part thereof, in that he had refused and neglected to satisfy and discharge the said two promissory notes and mortgage, but, on the contrary, had brought suit on one of such notes; that, upon an accounting, it would appear that plaintiff had sold sufficient cattle and property to satisfy and discharge, in full, said notes and mortgage; that, by transfer from Hardenberg and the Cattle Company, defendant Sherman was, at the time of the commencement of the action, as well at the time of making said answer, the only equitable owner of the right of redemption of said property; and, accordingly, prayed judgment for an accounting by plaintiff, and, further, that said defendant be allowed to redeem said mortgaged property, etc., (*R., 5–11*).

12. Under this unusual state of pleadings, namely, a suit on an ordinary money demand, and a counter-claim thereto, praying an accounting from plaintiff, as a mortgagee in possession of real estate, and also praying the right to redeem said real estate; the case came on for trial before the court (Hon. Webster Street), sitting without a jury, November 14, 1899 (*R., 25–30*).

The court, by its findings, conclusions, and judgment, entirely set aside the agreement by which plaintiff went into lawful possession of the property, in September, 1894, which it characterized as a mere *attempted* settlement, not carried out by plaintiff; and, notwithstanding plaintiff had been permitted to remain in undisputed possession of the property as *owner* for a period of almost five years, the court permitted the character of that possession to be changed to that of a mere mortgagee in possession, or "trustee for the benefit of defendant Sherman," and, as such, accountable for cattle sold therefrom by Ward while in possession (*R., 28–29*).

No such accounting, however, was in fact had; the court

itself having stated the account, at the trial, with no showing before it other than a certain paper-writing, which had been secured from plaintiff, in April, 1899, by an alleged prospective purchaser of the property; in which statement it was set forth, that, during certain years, (named,) Ward had sold a certain number of cattle, at a stated price, and that his expenses for running the ranch, during the same years, had amounted to a certain named sum.

This informal statement, not under oath, not made in court, but secured from plaintiff by a supposed purchaser, was taken by the trial court as conclusive, and an account stated against plaintiff, based entirely upon the figures therein named, (*R.*, *22–23*).

Thus it was that judgment was rendered against plaintiff, and in favor of defendant Sherman, by which the latter was awarded the possession, as owner, of valuable real estate, and a money judgment against plaintiff in the sum of $17,173.50 (*R.*, *26*).

13. Motion for new trial was made and overruled; and, thereupon, plaintiff appealed to the supreme court of the Territory, and assigned as errors, the admission and rejection of evidence; that the evidence did not sustain the findings and judgment of the court; and that such judgment was contrary to the evidence and contrary to law (*R.*, *24*).

14. The supreme court of the Territory had before it the findings of fact and judgment of the court below, as well, also, transcript of the testimony taken in the case, transcribed and certified by the court reporter, as authorized by the laws of the Territory; but, without going into the merits of the controversy, the court held that the assignment of errors was general and indefinite, and not sufficiently specific to be entitled to consideration; and, finally, that "*no error appearing upon the face of the record*," proceeded to *affirm* the judgment below, (*R.*, *88–90*; *98–100*).

And thus the case was brought to this court on appeal.

ASSIGNMENT OF ERRORS.

I.

The supreme court of Arizona erred, in holding that the errors assigned before that court were general, indefinite and not sufficiently specific; whereas the errors so assigned (Nos. 3, 4, 5, and 6, *R.*, *88*, *99*) directly averred that, upon the whole evidence, the judgment of the trial court was erroneous both in fact and law. The appeal to that court removed the entire cause thereto, and entitled appellant to the review thereof.

II.

The supreme court of Arizona therefore further erred in refusing and omitting to determine the cause upon the record, under the errors so assigned.

III.

The supreme court of Arizona erred in holding that no error appeared on the face of the record (*R.*, *89*, *100*); whereas, appellant avers, that the following errors did so appear:

IV.

That by the pleadings it affirmatively appears that there was no rescission by plaintiff, Ward, of the agreement of September 12, 1894 (*P. Ex. B.*, *R.*, *18*), whereunder plaintiff took possession of the property and premises covered by the prior mortgage to plaintiff.

V.

That no evidence was offered tending to show any rescission of the agreement under which alone the appellant lawfully entered upon and continued in the rightful possession of the property.

VI.

That no evidence was offered tending to show any title in appellee Sherman, as owner of the alleged equity of redemption.

VII.

That it was error to hold appellant Ward as a mortgagee in possession, when as plainly appears by the pleadings he took possession solely under the agreement aforesaid as absolute owner, and not otherwise.

VIII.

Upon a suit to recover a mere unsecured money demand, it was error to permit the appellee, Sherman, to file counter-claim, asking an accounting and right to redeem real estate from the plaintiff, as mortgagee in possession; and, also, error to enter judgment against plaintiff, and in favor of defendant, under such counter-claim.

IX.

Error to permit no accounting in fact, nor proper opportunity to plaintiff in that behalf, the court itself, without any reference, having stated an account and entered judgment thereon.

X.

That the judgment was not sustained by the record, it appearing therefrom that there was no outstanding equity of redemption which the Cattle Company, as mortgagor, could lawfully transfer to any one, the same having been extinguished by the agreement of September 12, 1894, whereunder and alone the possession of the premises was surrendered to and held by appellant, Ward, as absolute owner; that there was, in fact, no transfer of such extin-

guished equity of redemption to appellee, Sherman; that he was not, in law, entitled to assert any such pretended right as a counter-claim against the appellant's demand, which was an action solely to recover, according to the terms and spirit of said agreement, the amount of balance due thereunder, and upon his express declaration that such demand "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R.*, *4*).

XI.

That, as disclosed by the pleadings, appellant, Ward, went into lawful possession as owner of the property under the agreement above referred to; that he was under no obligation to cancel and surrender the notes and discharge the mortgage until full performance, or tender thereof, by the Cattle Company; that the counter-claim of defendant made no averment of performance or tender, of those things by the Cattle Company required to be done, before the right to the cancellation, surrender and discharge of notes and mortgage should accrue; and the court erred in entering the judgment herein, which cannot be properly founded on the pleadings.

XII.

That the court erred in finding and holding that plaintiff, Ward, "held said property as a trustee for the benefit of defendant Sherman, and that he is accountable for the property by him sold while in possession to the said defendant Sherman" (*R.*, *29*); whereas the record discloses that there was no legal evidence to establish such fact, or upon which to base such finding or conclusion.

BRIEF.

I.

A mere reading of the foregoing facts will disclose that this case is one of unusual hardship upon plaintiff.

Before considering the questions involved relating more particularly to the merits of the controversy, it may not be improper to refer briefly to the jurisdiction of the court below, and to its practice as applied in this case.

The judicial power of the Territory of Arizona is vested in a supreme court and in inferior courts, as provided by act of Congress, February 24, 1863 (*12 Stats., 664*), which act further provided, that the laws of the Territory of New Mexico, so far as not inconsistent, should be extended to the Territory of Arizona.

The organic act of the Territory of New Mexico, September 9, 1850 (*9 Stats., 446*), provided, *inter alia*, that the Constitution and all laws of the United States, not locally inapplicable, shall have the same force and effect within said Territory as elsewhere within the United States (§ *17*); and, further, that no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the laws of the land (§ *19*).

Section 1838, Revised Statutes of the United States, provides, that "the supreme court and the district courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

While, under the earlier decisions of this court, it was held, that claims at law and claims in equity cannot properly be united in one action, even in the territorial courts; yet, such intermingling of legal and equitable remedies in one form of action, finally, received the approval and sanction of this court, in the case of Hornbuckle *vs.* Toombs (*18*

Wall., 648) wherein said earlier decisions, laying down the contrary doctrine, were reconsidered and not approved; and it was held, that the practice, pleadings, forms and modes of procedure of the territorial courts are matters properly within the control of the territorial assemblies; and this doctrine has been adhered to since the decision in the last-named case.

While, therefore, such authority may now be assumed to exist, yet, in the absence of appropriate territorial legislation, it necessarily follows that the distinction between the two classes of remedies, legal and equitable, is recognized and preserved.

An examination of the forms of procedure in the several Territories discloses that, in the main, but one form of civil action is contemplated; and this, likewise, is true in respect of the Territory of Arizona, so far as its practice was governed by the Compiled Laws of 1877, which, in chapter 48, expressly provided, that "there shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs," to be commenced by complaint, etc. That provision of law was considered and approved by this court, in the case of Ely *vs.* R. R. Co. (*129 U. S., 291*).

The laws of said Territory were, however, revised, in 1887; and, in said revision, the distinction between actions and proceedings at law and in equity is clearly recognized and preserved (see §§ *601, 610, 893, 2144, 2399, etc.*); and, moreover, by § 3257, of said revision of 1887, chapter 48, of the Laws of 1877 (above referred to), is expressly *repealed*.

That being so, and unless counsel have inadvertently overlooked some provision in said revision of 1887,—the latter being the laws in force at the time of the institution and prosecution of this action,—it results that the distinction between legal and equitable remedies in the Territory of Arizona must be recognized and appropriately enforced.

Furthermore, it should be borne in mind that, under said

Laws of 1887, it is, among other things, provided, that no counter-claim for unliquidated damages may be set off against an action for a liquidated sum, and that no liquidated sum may be set off against an action for unliquidated damages (§ *736*), and that if a suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of plaintiff (§ *740*); *Provided, however*, That nothing in the preceding section shall be construed to prohibit defendant from pleading in set-off any counter-claim founded on a cause of action arising out of, incident to, or connected with, plaintiff's cause of action (§ *741*).

While, apparently, the right of trial by jury is recognized and preserved under the laws of said Territory, such right is preserved only to a limited extent. Section 109, of said Laws of 1887, requires parties litigant to demand a jury trial at the time of the call of the docket of the court, said demand to be accompanied by a deposit to cover the *per diem* of such jury for one day; and, if such demand be not then made, the right to a trial by jury shall be regarded as waived, and the cause shall be tried by the court, unless, of its own motion, it shall otherwise order.

Having in mind the above provisions of law, the pleadings in this case may be briefly considered.

Plaintiff filed an action to recover a mere unsecured money demand, in the sum of $1,500. To this defendant interposed, by way of defense, a counter-claim, praying an *accounting* from plaintiff, based upon the occupancy by him of certain real estate in the capacity (as claimed by defendant), of a mortgagee in possession; as well, also, praying the right to *redeem* said real estate from plaintiff.

Under this state of pleadings, in which is well illustrated a most complete confusion and intermingling of legal and equitable remedies, the cause was tried by the court, sitting without a jury, (the record being silent as to any *express* waiver of trial by jury,) resulting in judgment against plain-

tiff for the recovery by defendant, as owner, of a large and valuable tract of real estate, with valuable personal property and stock thereon, and a money judgment against plaintiff, in the sum of $17,173.50.

The court arrived at the amount of said money judgment not by any actual accounting or opportunity afforded in that behalf, but based it upon a mere informal statement, not under oath, not made in court, but secured from plaintiff by a supposed purchaser. The figures given in that statement were manifestly but mere approximations, tending to support the price asked by the owner for the property. Those figures the court accepted as final, and stated an account based *exclusively* thereon.

II.

As above shown, the money matters between plaintiff and the Cattle Company were adjusted and settled by the agreement entered into September 12, 1894, and which agreement, as has already been pointed out, was signed in the name of the Cattle Company by defendant Sherman, as its president.

Under that agreement, plaintiff was to be put in possession of *all* of the property of the company, not as mortgagee in possession, but as absolute owner. In addition, the Cattle Company covenanted to transfer and convey said property to him, by proper deeds of conveyance, within the period of thirty days thereafter; and, further, that all stock cattle sold from the range subsequent to September 1, 1894, should be accounted for to plaintiff. In consideration of the performance by the Cattle Company of all and singular said covenants and undertakings, plaintiff agreed to surrender, cancel, and discharge the two certain promissory notes and mortgage, hereinabove referred to.

The agreement expressed, in clear and unmistakable terms, the exact settlement between the parties, and the precise terms thereof, as well, also, the exact character, as *ab-*

solute owner, in which plaintiff was to be placed in possession of the property. The only things required to be done and performed by plaintiff consisted in the surrender, cancellation and discharge of the two notes and mortgage; but that performance was conditioned upon *prior* performance by the Cattle Company, as above stated.

Thus, the duties and obligations of the respective parties to the agreement, as well the exact order of such performance, were fixed in precise and certain terms.

In performance of that agreement, the Cattle Company placed plaintiff in possession of the property; it executed to him a bill of sale covering certain personal property known as Desert Wells, and not embraced in the original mortgage; it did not formally transfer to him, by deed of conveyance, the real estate, nor the cattle, farming implements, etc., described in the agreement of September 12, 1894, under which alone plaintiff took possession; and it failed to account to him for 104 head of cattle, which latter it appeared had been sold from the range subsequent to September 1, 1894, in violation of said agreement, and for which, under the terms thereof, said Cattle Company had covenanted to account. Plaintiff estimated that said cattle were of the value of $1,500; and it was for that sum, and growing out of the facts just stated, that he brought suit.

It may, perhaps, be suggested that this item of claim might have been made the subject of suit by plaintiff against the Cattle Company, for breach of its contract, to the extent above mentioned. It is evident, however, that plaintiff proceeded upon the theory that, under said agreement, he was entitled to a full and complete performance of all things agreed to be done by the Cattle Company, before it became incumbent upon him to surrender and cancel the notes; and that said notes had been satisfied and discharged to the extent that the Cattle Company had performed its agreement; but that to the extent the agreement had not been performed, namely, $1,500, (the estimated value of said 104 head of

cattle,) the indebtedness due plaintiff had not been discharged. Thus it was that plaintiff brought suit to recover, not the principal or interest of the notes, or either of them, but simply the sum of $1,500, upon the theory that that amount was due as an unpaid and *unsecured balance* growing out of the above transaction.

That in so suing, plaintiff had no intention of disavowing, abandoning, or rescinding the agreement of settlement, so far as he was concerned, and that his suit did not have such effect, in law, is perfectly manifest from the pleading, in which he expressly avers that the only amount sued for is a "balance due" of $1,500, and that the payment thereof "*is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property*" (*R.*, *4*).

Hence, not only was there no abandonment or rescission of the agreement by plaintiff; but, on the contrary, by his pleading, he effectually made it impossible to thereafter assert that the note, or said balance claimed thereunder, was any part of a secured obligation, or that the mortgage, originally given to secure the note, was then in *legal* existence.

Attention is again particularly asked to the exact situation of the parties and the subject-matter embraced in the litigation. By the arrangement referred to, plaintiff went into possession of the property as *absolute owner*, in September, 1894; and, because of his inability to secure an accounting to the extent of the value of the cattle, as above, he filed suit, in November, 1894. There the matter rested, (presumably because of the absence of defendants from the jurisdiction of the court,) for a period of upwards of five years; during all of which time, plaintiff was permitted to remain in complete and undisputed ownership of the property, exercising all the rights incident to such full ownership.

Subsequently, and in May, 1899, when defendant Sherman was served with process, he appeared in the action, and, for the first time, asserted that plaintiff's possession of

the property was *not* that of owner, but that merely of a *mortgagee in possession;* and this too despite the agreement of settlement, of September, 1894, which defendant, in his said counter-claim, expressly admitted had been entered into, and which, as shown, had been acted on by all parties for upwards of five years.

The only possible theory under which defendant could have prevailed, (even assuming that the practice of the Territory permitted such unusual counter-claim of a purely equitable nature in a suit based on a mere legal demand to recover a sum certain, but which practice is not here admitted,) is, that *no* such agreement had been effected or made—a theory utterly at variance with the pleadings, as well absolutely impossible thereunder.

As has been shown, the agreement contained certain distinct promises, *each* to be performed by the Cattle Company *before* the notes and mortgage were required to be canceled and discharged by plaintiff.

The counter-claim nowhere asserts such performance, or even a tender of performance, by the Cattle Company; and it was, therefore, a manifest error to assume a breach or rescission of contract, on the part of plaintiff, simply because of his alleged failure to cancel and surrender the notes and discharge the mortgage. That obligation was not upon him until full performance by the Cattle Company, or a proper tender thereof. Placing Ward in possession of a part of the property was only *part* performance; and, until he was placed in possession of *all* the property, and transfer and conveyance thereof made to him by appropriate deeds of conveyance, he was under no obligation to cancel the notes and discharge the mortgage. Plaintiff did not sue under the mortgage, but by his complaint effectually estopped and precluded himself from thereafter asserting any rights or claim thereunder; and it is plain that a judgment against plaintiff, founded on such answer and counter-claim, upon

the theory that no such agreement had been made or existed, was erroneous.

That the law was incorrectly applied by the courts below in this case is abundantly established by the authorities.

Take, for example, the following:

"If the contract in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties" (*vol. 7, A. & E. Enc. L., 2d ed., p. 118, and cases cited in note 1*).

"Where the performance of one's duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties or that the other party has waived the performance of them" (*id., p. 145, and cases cited in note 8*).

"Whether made a condition precedent or not, it demands as a prerequisite to a recovery that the complainant show either a tender of performance, or a readiness or willingness to perform, or that this willingness was rendered ineffectual by conduct of the other party which makes compliance either unnecessary or impossible" (*id., pp. 146–147, and cases cited in notes 1, 2, and 3*).

This doctrine of the law will be found recognized and followed in cases innumerable; and it has been thoroughly settled by the decision of this court, in the case of Jones *vs.* United States (*96 U. S., 24*), from the opinion in which, the following is quoted:

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. For, where the right to demand the performance of a certain act depends on the execution by the promisee

of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract (Graves *vs.* Legg, 9 Exch., 709; Morton *vs.* Lamb, 7 Term, 125; 2 Wms. Saund., 352*b*; 2 Smith, Lead. Cas., 13).

"Well-considered authorities everywhere agree that a contract may be so framed that the promises upon one side may be dependent upon the promises upon the other; so that no action can be maintained, founded on the written contract, without showing that the plaintiff has performed, or at least has been ready, if allowed by the other party, to perform, his own stipulations, which are a condition precedent to his right of action: * * *

"Additional authorities to show that a party bound to perform a condition precedent cannot sue on the contract without proof that he has performed that condition, is scarcely necessary, as the principle has become elementary (Governeur *vs.* Tillotson, 3 Edw. (N. Y.) Ch., 348)."

Under the terms of the agreement of September 12, 1894, it was stipulated that the conveyance by deed and delivery of *all* the property should be made or tendered within thirty days, to wit, October 12, 1894. Suit was not brought by Ward until November 28, 1894. *Time* was an express condition of the contract. This important point is entirely ignored by the trial court, and its sixth finding (*R., 28*) that Ward failed to cancel the notes or satisfy the mortgage, is in direct conflict with the necessary legal result of the pleadings on which the case was tried.

It cannot be said that five years subsequent to the surrender of possession, the company (or its assumed assignee Sherman), can take advantage of its own breach of the agreement, and claim that plaintiff took possession under the mortgage as a trustee for the mortgagor or his assigns. That view would simply make the primary breach of contract by the Cattle Company and Sherman a ground for re-

storing to them the property under a new theory devised five years after the contract, and after their breach thereof.

All authorities agree that the right to claim a rescission is only to be exercised, if at all, within a *reasonable* time, and that a party to an agreement will not be permitted to wait an unreasonable or unconscionable time to assert such rescission, when to so hold would be to work irreparable injury and loss to the other party to the agreement.

It may be stated generally that unreasonable and inexcusable delay, on the part of one seeking rescission of a contract, will be deemed a waiver thereof:

Cummins *vs.* Lods (1 McCrary, 338);
Grymes *vs.* Sanders (93 U. S., 55).

In the latter case, this court, speaking of the question of delay, as affecting the right to relief, adds:

"He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

The English rule of decision, touching the same question, is thus stated, in the case of Petroleum Co. *vs.* Hurd (*L. R., 5 P. C., 221*):

"When it would be practically unjust to give a remedy either because a party has by his conduct done what might fairly be considered a waiver of it, or where by his conduct or neglect he has, though not perhaps waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy would afterwards be asserted in either of these cases, lapse of time and delay are most material."

The *rescission* of a contract is a remedy to be applied in the sound discretion of the court, and only he is entitled to it who can show that he is without fault, or that the other party is derelict. (*Thomas vs. McCue, 53 Pac. Rep., 161.*)

Under the facts in this case, it would be most unreasonable to permit defendant Sherman, at such late date, to assert for the first time, an alleged abandonment or rescission of the original agreement by Ward, simply and only because of the fact that plaintiff instituted suit to recover a sum that he conceived to be due him under and as a part of the agreement itself,—the theory of abandonment having come into being upwards of five years after the contract, and apparently to meet the exigencies of this suit.

III.

From the foregoing, it necessarily results that the conclusion by the court below "that the plaintiff held said property as a trustee for the benefit of defendant Sherman and that he is accountable for the property by him sold while in possession, to said defendant Sherman" (*R., 29*), cannot be sustained by the pleadings; and, moreover, is not supported by any legal evidence.

The statement of the trial court that Ward was a mortgagee in possession is erroneously styled a "finding." *Contra* it was and could be only a legal conclusion drawn from assumed facts which in truth have no existence in this record.

But even if treated as a finding of an *ultimate* fact, it is wholly inconsistent with the pleadings; is absolutely unsupported by legal evidence; and is, as matter of law, erroneous.

In making this statement, counsel are not unmindful of the rule of decision many times asserted by this court as, for example, in the case of Young *vs.* Amy, (*171 U. S., 179,*) that, on an appeal from the judgment of the territorial courts, the findings of fact are conclusive upon this court.

That general doctrine, however, is subject to a well-defined limitation, which is here applicable, namely, that where such court has certified to this court, along with its findings,

the evidence on which a fact essential to the judgment rendered was found, and from which evidence it appears that there was *no* legal evidence to establish such fact, this court will reverse the judgment.

The practice regulating appeals from the territorial courts is similar to that in respect of appeals from the Court of Claims; in each of which it is contemplated that only the ultimate facts, and conclusions based thereon, shall be certified as the record on appeal.

In the present case, the court has before it the entire record, consisting of the pleadings, exhibits, testimony, findings, conclusions, and judgment.

In the case of United States *vs.* Clark, (*96 U. S., 37,*) on appeal from the Court of Claims, the latter court found, among others, a fact essential to support the judgment rendered. In certifying its findings of fact, said court likewise sent up the entire record. From an inspection of the latter, it conclusively appeared that there was *no* legal evidence before the Court of Claims upon which said ultimate fact could have been found.

This court there sustained its right to look at the record, and to determine therefrom that it contained *no* legal evidence to support the finding. In the opinion, this right is thus stated:

"We are of opinion that when that court has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is any evidence to support its verdict; that is, its finding of the ultimate fact in question."

See, also, Moore *vs.* United States (*91 U. S., 270*).

Applying the doctrine of that case to the case at bar, it establishes the right of this court to determine that there was *no* legal evidence upon which the court could base its finding or conclusion, above referred to, by which it undertook to convert the possession of Ward as *owner* into that of a mere trustee or mortgagee in possession. Not only was there *no* legal evidence justifying such conclusion, but the uncontroverted evidence established exactly the reverse. It is not necessary that the court should weigh the testimony in order to so determine; nor is it necessary to even open the testimony, since it will be found admitted in the pleadings and accompanying exhibits.

This matter being properly determined, the result necessarily follows that the judgment based upon such finding or conclusion was erroneous.

IV.

In conclusion, it is proper to refer briefly to the summary manner in which the court below disposed of this case, resulting in sacrificing the rights and property of plaintiff, amounting to many thousands of dollars.

The decision of the court below, and its statement of facts, comments on the failure of counsel for appellant to specify, under errors "A" and "B," what evidence was admitted or rejected, (*R. 88, 99;*) *but* assignments "C," "D," "E" and "F" averred that the evidence does not sustain the findings and judgment, and that the judgment of the trial court is contrary to the evidence and to law (*R. 99*).

And here be it remembered that this case was tried by the court, sitting without a jury, and all the evidence was transcribed and certified as part of the record, in the court below; an entirely different situation from that of an ordinary review under bills of exception.

This is a matter of express statutory direction. The legis-

lature of the Territory passed an act March 18, 1897, No. 71, providing as follows:

"SEC. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the supreme court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case."

This section was quoted and applied in the case of Apache County *vs.* Barth (*177 U. S., 538, 541*).

It was, hence, the duty of the supreme court of the Territory to consider the testimony and give full effect thereto as "a part of the record in such case."

The facts absolutely essential to the judgment rendered were not only *not* supported by the evidence (as has been above shown), but said entire evidence (not merely the *weight* thereof), including the admission of defendant in his answer and counter-claim, established the *exact opposite* thereof.

Hence, the assignments in this regard, in a case tried by the court, sitting without a jury, were quite as definite, certain and specific as the nature of the case admitted; and clearly entitled appellant to the review of the entire record. To hold otherwise, would simply result in a denial of justice by the application of technical requirements.

It is not necessary to here follow the criticisms of the court below, or of counsel for appellees, in their printed brief in this court, touching the matter of alleged failure to comply with mere rules of practice, etc.; it is sufficient to state that the errors complained of were fairly presented to the court below for its review; and, furthermore, notwithstanding said court, in its opinion, comments on the failure of appellant to sufficiently assign and specify error, and, apparently, disposed of the appeal in a summary manner; it did not

dismiss the appeal because of such imperfections, but *affirmed* the judgment below, as follows:

"And no error appearing upon the face of the record, the judgment of the court below is affirmed" (*R., 100*).

Manifestly if the judgment of the court below was erroneous, as matter of law, upon a review of the entire record, it was the duty of the supreme court of the Territory to review the record and so decide (Apache Co. *vs.* Barth, *177 U. S., 538*).

Appeals from the territorial courts are intended to further the ends of justice, and even in its many decisions pointing out imperfections in records from such courts, it is evident that this court has always carefully protected substantial rights of appellants, in order to prevent injustice or miscarriage of justice, simply because of the application of technical requirements (Salina Stock Co. *vs.* Salina Creek Co., *163 U. S., 109, 118*).

The pleadings and accompanying exhibits show manifest error in the judgment, even without resort to the evidence. But if, for any reason, the court shall be of opinion that there is no sufficient statement of facts, it is earnestly urged that the property and rights of appellant should not be permitted to be sacrificed,—the ends of justice would be better met by remanding the case for a further statement of facts.

It is respectfully submitted, however, that under the present record, manifest error does appear; and that the judgment should be reversed.

A. B. Browne,
C. S. Wilson,
A. A. Hoehling, Jr.,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 25.

JOHN M. WARD, APPELLANT,

vs.

MOSES H. SHERMAN AND DAVID HARDENBERG.

Reply Brief for Appellant.

The supplemental brief for appellees assumes an erroneous premise of fact, to wit, that appellant, Ward, rescinded the contract of September 12, 1894, by bringing suit for $1,500 as upon an *unsecured* balance of the original Hardenberg note for $12,500.

Contra, his pleading in that suit was in exact accord with the contract and all his actions under it. There was no evasion or rescission thereof, because:

A. The suit was, in effect, to recover the $1,500 value of cattle, which the company, through Hardenberg, had sold *after* the agreement of September 12, 1894, and for which they had in terms agreed to account. This is made plain by the evidence, which is in complete harmony with this lawful demand Ward was thereby seeking to enforce. That

the company, under its agreement, was required to account for such cattle as had been sold since September 1, 1894, is conceded by counsel for appellee (Supplemental Brief for Appellee, p. 5).

B. In respect of any technical objection as to *form*, this was the sole and only purpose of the suit. By the suit Ward demonstrated his faithful observance of the agreement by demanding only what was due under the agreement—not a dollar more. If Ward intended to repudiate the agreement, that intent would become evident only on his suing for the entire note—default having occurred—and by seeking to foreclose under the mortgage.

C. As clearly shown in our main brief, Ward was not obligated to cancel the notes and discharge the mortgage upon the record *until* and *after* defendants had kept their antecedent promise of the agreement to formally reconvey the property to him; as well, also, to deliver possession of *all* thereof to him.

D. The argument that the contract of September, 1894, was *entire* may be admitted for all the purposes of this case. Ward kept all his agreements and promises under the contract, even *after* the other parties had failed to keep theirs by making or tendering any reconveyance of the property to him. They failed to do so for nearly five years after this suit was brought. They never have tendered such conveyance, although by the express language of the contract such conveyance was to be made by them within thirty days after the making of the contract—September 12, 1894.

E. Appellees, having committed the *primary* breach of the contract, cannot be heard to say that because Ward went into possession thereunder, and because he sued to recover the amount due under their agreement, waiving all the bal-

ance and declaring by his pleadings that the mortgage was non-existent and the balance sued for—$1,500—was an unsecured demand, thereby *on the record affirming* the obligations of the contract as they affected him, Ward has rescinded the contract or committed any breach thereof. They have clearly failed to perform their part of the contract. Ward faithfully performed his and admitted on the record, by his own sworn pleadings, that he stood bound thereby. It is hence erroneous to now contend that in any manner Ward has rescinded or abrogated the contract. The contrary alone is the fact.

F. On such untenable argument it is equally erroneous to say that Ward was in possession only as mortgagee. By express contract he resumed possession as *owner*. The contract was not unjust or fraudulent as to them. Ward offered to largely discount the mortgage debt by striking off $5,000 thereof. They declined his offer, and thereupon he accepted their original proposition to take possession—receive formal conveyance and then cancel the notes and mortgage. Their *precedent* promises have not been kept. Yet Ward has not sued to recover upon the mortgage or to foreclose, but simply to recover the balance due him under the agreement.

This renders all the remainder of the supplemental brief of no practical importance in the discussion of the case. Its foundation premise being erroneous both in fact and law, the superstructure of argument built thereon necessarily falls.

In *Wiggins Ferry Co. vs. O. & M. Railway* (142 U. S., 396), this court pertinently said (p. 415):

> "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such

> amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made (*Schooner Anne vs. United States*, 7 Cranch, 570)."

We submit this doctrine has plain application here. If the appellant's pleading was inartificially drawn, or was deficient in form, it is manifest that his claim "is founded upon principles of equity and justice," and his pleading can well be harmonized with that substantial justice which it is plain he is entitled to receive.

That the supreme court of Arizona erred in refusing to hear and determine the case upon the merits is obvious from the following considerations:

In *Salina Stock Company vs. Salina Creek Company* (163 U. S., 109, 118), a case from the supreme court of Utah Territory, this court said:

> "Without denying the authority of this court to find error in the judgment of the supreme court of a Territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority unless we were able to perceive that injustice had been done."

Injustice was done in the case at bar because (1) the practice act of Arizona provides (Main Brief, p. 26):

> "SEC. 1. Whenever an appeal or writ of error is taken from any district or circuit court of this Territory to the supreme court of the Territory the appellant or plaintiff in error, as the case may be, may have the testimony taken in the case transcribed and certified by the court reporter and file the same with the papers in the case, and thereupon it shall become and be a part of the record in such case."

The clerk of the trial court certified the record to the supreme court of Arizona (Rec., 40) under the following certificate:

> "I hereby certify and transmit to you the entire record in said cause; including original papers on file in this court, and all minute orders in the case; the decision and judgment rendered in said cause by this court, and entered of record therein, together with the testimony taken in the case as transcribed and certified to by the court reporter, and filed as a part of the record in this cause."

The supreme court of Arizona therefore had before it the *entire* record. The cause went to that court by appeal, and was, first, in the nature of a suit in equity; and, second, was tried by the court below without a jury. What was the measure of duty cast upon the supreme court of Arizona in an appeal case and with the entire record before it?

The inquiry is answered by the decision of this court in *Stringfellow vs. Cain* (99 U. S., 610), where, in speaking of the civil practice act of Utah, this court said:

> "When an appeal is taken to the supreme court of the Territory the law requires a statement to be settled and signed by the judge who heard the cause, which shall set forth 'specifically the particular errors or grounds' relied on 'and contains so much of the 'evidence as may be necessary to explain the particu-'lar errors or grounds specified and no more.' This statement is annexed to the copy of the judgment roll or order appealed from and furnished to the supreme court. Comp. Laws Utah, 1876, 493, 494.
>
> "The statement settled and signed in this cause, annexed to the copy of the order refusing a new trial appealed from, contained all the 'testimony, written proofs, and statements of the parties' certified up from the probate court, and upon which the trial was had; and it was stipulated that the statement on the appeal from this order might be used, so far as applicable, on the appeal from the judgment. Thus the

> proceeding was made to conform to the regulations of the practice act in reference to appeals in civil actions, and the court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether the facts as found would support the judgment. *In short, the supreme court of the Territory was called upon to determine whether, according to the justice of the case as shown by the record, the judgment of the district court was right.*"

The practice act of Arizona quoted *supra* is substantially similar in this respect to the practice act of Utah, and it was hence clearly the duty of the court in the case at bar to examine the whole record, even upon the broad assignment of error that the judgment and findings of the trial court were contrary to the evidence.

Such is the duty and the constant experience of this court in appeal causes coming up from the Federal courts.

As merely illustrative, we cite the case of *Lalone vs. The United States* (164 U. S., 255). That was a suit in equity, wherein the United States sought to recover certain pension moneys alleged to have been paid upon fraudulent proof. The circuit court sustained the prayers of the bill, holding that by the preponderance of evidence submitted in the cause the United States was entitled to such relief. As the appeal transferred to this court the entire cause, it could not be here determined without this court's review of all the testimony. The substantial error assigned in this court was that the testimony did not justify the findings of fraud alleged. Without suggestion of any insufficiency in such assignment, this court proceeded to examine with minute care a record of testimony many times more voluminous than the record of testimony presented to the supreme court of Arizona in the case at bar, and thereon reversed the decree below and directed dismissal of the Government's bill. What this court may thus do in the discharge of its duty, certainly the supreme court of Arizona should do in like discharge of duty

Moreover, the case was fully argued at the bar in the supreme court of Arizona, as appears from the minute entries on the journal of that court (Rec., 96), which recites:

> "This cause coming on for hearing was argued by Mr. Jos. H. Kibbey and E. J. Edwards for appellant and Mr. C. F. Ainsworth and Mr. C. N. Sterry for appellees, and cause ordered submitted.
>
> "On motion of Mr. Jos. H. Kibbey, it is ordered that appellant have permission to file supplemental brief herein."

Therefore the case was both fully argued orally and on original and supplemental brief, submitted for appellant as well.

Again, the petition for rehearing submitted by appellant's counsel in that court (Rec., 92) pertinently said:

> "Again, when *all* the evidence has to be considered to determine whether it supports a verdict or finding it is specific as it can be made, we submit, to say that the evidence (all of it taken together) is not sufficient to support the finding; wherein it is insufficient cannot be specified because it all must be considered. Does it in the aggregate support the finding?
>
> "It is to be remembered that there was little or no conflict of evidence. It is not a case where one or several items of conflict could be picked out and specified.
>
> "The question whether Ward, the appellant, was a mortgagee in possession or not is one of law apparent on the face of the pleadings and is fundamental.
>
> "The question whether the judgment of the court is contrary to law is apparent upon an examination of *all* the evidence, not any specific part of it or any part of it less than the whole. If it be conceded that Ward was a mortgagee in possession then would not the proper judgment be that he account.
>
> "We concede the rule generally as asserted by the court. But in construing it we may advert to the reason of it when we seek to apply it. No one was misled; no one, either of court or counsel, was preju-

diced or put to any extra care, trouble or labor to ascertain the errors complained of. Appellant fully stated them in the very paper embodying the assignments of error. The appellee understood them and answered the objections.

"It certainly cannot be said that either the court or counsel were not apprised of the merits of dispute, plainly and distinctly called to their attention and receiving their consideration.

"The enforcement of a rule when the reason for it is absent does not promote justice. It may punish the lawyer, it is true, but that is not the purpose, we submit.

"If this judgment is unjust—if it is unwarranted by law—if it is against the law, then it seems to me that the court should rather seek a reason to exercise its powers to do justice than to avoid a consideration of the merits of the case."

Now, in face of all this plain reasoning, the opinion of the supreme court below in affirming the judgment of the trial court condemns as wholly insufficient *all* the assignments of error. Of course errors 1 and 2, relating to the admission or rejection of evidence, were insufficient, because they did not apprise the court to what evidence such alleged errors were addressed. But assignments of error 3, 4, and 5 clearly and distinctly declare that the evidence did not sustain the judgment or findings of the court, and that hence the judgment was contrary both to the law and the evidence. This was plainly all-sufficient, since and beyond all question it was necessary for the court to review the evidence as a whole in order to reach a just conclusion, precisely as this court did in *Lalone vs. United States, supra.*

Where such form of error was assigned it was impossible, except on brief and oral argument, to further develop the reasons on which such broad and fundamental error was thus assigned. In no court and under no practice would it be necessary or proper to include in such an assignment of error a recital of all of the evidence; but that part of the rec-

ord in which the evidence appears is by necessary intendment and the reasonable exercise of common sense incorporated into and made a part of such form of assignment.

Undoubtedly, and speaking broadly, the assignment of errors, as its office and purpose indicates, is to draw the attention of the court to the specific error on which the appellant relies; but it is manifest that where the court has power and jurisdiction to review on appeal the entire cause and the appellant insists that upon the whole evidence the judgment below was incorrect, such form of assignment is sufficient in law and reason, and must require the court to review the whole of the evidence. Like a demurrer to evidence, such form of assignment of error brings into review *all* the evidence.

Notwithstanding all this, however, the opinion of the supreme court of Arizona in this case condemns all the errors assigned, and thereby the court excluded from review and consideration the *evidence* taken in the cause on which this broad and fundamental error was duly assigned and lawfully predicated.

Having thus ignored all the evidence, the court then in a few words declares that it found no error "appearing upon the face of the record" and hence affirmed the judgment.

The injustice of this action is apparent. The court deliberately turned its back upon the evidence, which was part of the record, and refused to give it any consideration, and declaring in a few words that no error appeared upon the face of the record, *excluding the evidence* from consideration, the judgment should be affirmed.

Now, in *Stringfellow vs. Cain, supra*, involving analogous practice act, this court said:

> "In short, the supreme court of the Territory was called upon to determine whether, *according to the justice of the case as shown by the record*, the judgment of the district court was right."

With the evidence in this case forming part of the record, is it not plain and positive that injustice has been done?

Salina Stock Co. vs. Salina Creek Co. (*supra*).

Is it not clear that the supreme court of Arizona has denied this appellant that justice to which he was clearly entitled by refusing to review the evidence under a plain, sufficient, and comprehensive assignment of error, whereby it became the duty of that court to review all of the evidence in order to determine, as we submit it was bound to do, "the justice of the case as shown by the record"?

In legal effect the action of the supreme court of Arizona put the case in that court in precisely the attitude it occupies here under the practice act of 1874, by refusing to review the entire record and treating the case as if it stood only for consideration upon "the face of the record" *dehors* the evidence.

It is in no sense necessary here to sacrifice substance to form, because the entire record demonstrates that Ward stood faithfully by his agreement, and sought only to recover the balance due him thereunder.

Respectfully submitted,

A. B. Browne,
C. S. Wilson,
A. A. Hoehling, Jr.,
Attorneys for Appellant.

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FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

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No. 286.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

JOHN M. WARD,

Appellant,

VS.

MOSES H. SHERMAN and DAVID HARDENBURG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES MOSES H. SHERMAN AND DAVID HARDENBURG.

C. F. AINSWORTH,

Attorney for Appellees.

The Arizona Republican, Phoenix.

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Supreme Court of the United States

OCTOBER TERM, 1902.

NO. 286.

JOHN M. WARD, Appellant, vs. MOSES H. SHERMAN and DAVID HARDENBURG.	Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEES, MOSES H. SHERMAN AND DAVID HARDENBURG.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Third Judicial District of said Territory. The Supreme Court of Arizona affirmed the judgment of the said District Court for the reason that the assignment of errors did not conform to the requirements of the statutes of Arizona nor to the court rules of the court, and were considered by that court as no assignments whatever.

It is the contention of the appellees that the only matter brought here for review is the decision of the Supreme Court of the Territory of Arizona as to the construction of the Territorial statute and its rules of court on pure questions of practice before the Supreme Court of the Territory of Arizona, which decision is as follows: (Record pages 88 and 89.)

In the Supreme Court of the Territory of Arizona.

John M. Ward, Appellant,

vs. —No. 746. Opinion.

Moses H. Sherman, Appellee.

Appeal from District Court, Maricopa County; Webster Street, Judge.

Kibbey & Edwards for appellant.

C. F. Ainsworth, Frank Cox and C. N. Sterry, for appellee.

Per curiam: The brief of the appellant in this case contains the following assignment of errors: "(1.) The Court erred in admitting evidence adduced by the defendant. (2.) The Court erred in rejecting evidence offered by the plaintiff. (3.) The evidence does not sustain the judgment, findings or verdict of the Court. (4.) The evidence does not sustain the findings of the Court. (5.) The judgment of the Court is contrary to the law. (6.) The judgment of the Court is contrary to the evidence." The rules of this court (rule 3) require "a specification of

the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. * * * * When the error alleged is to the finding of the Court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding." It is further prescribed (rule 6) that "all assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. * * * * An objection to the ruling or action of the court below, will be deemed waived here, unless it has been assigned as error, in the manner above provided."

There is objection made by counsel for the appellee to the consideration of the assignment of errors in this case, on the ground that the same does not conform to the requirement of the statute and the rules of the court. The objection is well founded. The errors assigned are but general and indefinite. They point us to nothing specific, and utterly fail to comply with the express provision of our rules. This court is an appellate one, and the prime object of these rules is the designation of specified errors, in order that the court and opposite counsel may be clearly informed of what particular ruling or action below is relied upon for the reversal or modification of the judgment. An assignment which does not distinctly point out these matters—one which compels the court and the

counsel to look further and to search the brief and record in order to discover them—entirely fails to accomplish the purpose of its being. Not one of the errors here alleged is sufficiently specific to be entitled to consideration. General assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this Court, and likewise by other courts operating under similar rules. Newmark et al. vs. Marks (Ariz.), 28 Pac. 960; Christy vs. Arnold (Ariz.), 36 Pac. 918; Main vs. Main (Ariz.), 60 Pac. 888; Treat vs. Jemison, 20 Wall. 652; United States vs. Indian Grave Drainage Dist., 85 Fed. 928; Louisiana A. & M. R. R. Co., vs. B'd Levee Com'rs, 87 Fed. 594; Chandler vs. Pomeroy, 96 Fed. 156; Percy Consol. Min. Co. vs. Hallam (Col.), 44 Pac. 509; Schofield vs. Territory (N. M.), 56 Pac. 306. The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed.

GEO. R. DAVIS, A. J.
RICHARD E. SLOAN, A. J.
FLETCHER M. DOAN, A. J.

ARGUMENT.

It is now well settled by a long line of decisions of this Court that a judgment or decree of the highest court of a Territory can be reviewed by this Court, upon a writ of error, only on the exceptions or questions of law presented by the record; and upon an appeal, on the rulings of the court below. And this Court has also established the rule that in appeals from a Territorial court, the evidence at large cannot be brought up, but only a statement of facts and the rulings made at the trial and duly excepted to on the admission or rejection of evidence; and that the authority of this Court is limited to determining whether the court's findings of fact support its judgment and decree, and whether there is any error in such rulings, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court.

As was said in the case of Hecht vs. Boughton, reported in 105 U. S. 235, 236, Chief Justice Waite writing the opinion,

"We are not to consider the testimony in any case. Upon a writ of error we are confined

to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive upon us."

This rule as regards the limit of investigation by this Court of matters brought before it on appeal, has been well established by a long line of cases, and we would respectfully call the attention of the Court to several of them wherein this rule has been followed.

Harrison vs. Perea, 168 U. S. 311 on 323.
Idaho & Oregon Land Improvement Co. vs. Bradbury, 132 U. S. 509.
San Pedro etc. Co. vs. United States, 146 U. S. 120.
Haws vs. Victoria Copper Mining Co., 160 U. S. 303.
Jenkins vs. Neff, 186 U. S. on 235.
Stringfellow vs. Cain, 99 U. S. 610.
U. S. vs. Hailey, 118 U. S. 233.
Murphy vs. Ramsey, 114 U. S. 35.

This therefore being the limit of the investigation of this Court upon this appeal, we will take up the matter of the statement of fact certified to by the Supreme Court of the Territory of Arizona, for consideration.

In accordance with the requirements of law, the Supreme Court of the Territory has certified to this Court its statement of facts constituting its findings

of fact in the nature of a special verdict, which is as follows: (Record pages 98, 99 and 100.)

In the Supreme Court of the Territory of Arizona.

John M. Ward, Appellant,

vs

Moses H. Sherman and David Hardenburg,

Appellees.

STATEMENT OF FACTS.

The above-entitled cause having been argued and submitted to this Court at the January, 1901, term thereof, and the judgment appealed from having been on the 21st day of March, 1901, in all things affirmed by this Court, and a motion for a rehearing having been filed by the appellants, and the same having been overruled, and the appellants desiring to prosecute an appeal to the Supreme Court of the United States from the judgment of this Court in the case, and having applied for the statement of facts in the case in the nature of a special verdict pursuant to acts of congress in such case made and provided.

Now, therefore, this Court on this 19th day of March, 1902, the same being a day of the January term of said court, make and file the following statement of facts, to-wit:

I.

The appellant on the 18th day of Novem-

ber, 1900, filed in the office of the clerk of the Supreme Court of Arizona the record of this cause which included the transcript of "the testimony taken in the case transcriped and certified by the court reporter" as permitted by Section 1 of Act No. 71 of the Laws of 1897, which transcript of the testimony so transcribed and certified is as follows:

(See Reporter's Transcript, pages 74-162.)

During the trial the following exhibits were introduced as evidence by the plaintiff, being Plaintiff's Exhibits A and B.

(For Plaintiff's Exhibit A, see pages 31, 32.)

(For Plaintiff's Exhibit B, see pages 32-35.)

The defendant during the trial of the case, introduced the follows exhibits as evidence:

Exhibit 1. (See pages 36-37.)
Exhibit 2. (See pages 37-38.)
Exhibit 3. (See page 39.)
Exhibit 4. (See pages 40-42.)
Exhibit 5. (See page 42.)

II.

The Court further finds that thereafter the appellant filed in this Court his brief containing the following assignment of errors:

A. The Court erred in admitting evidence adduced by the defendant.

B. The Court erred in rejecting evidence offered by the plaintiff.

C. The evidence does not sustain the judgment, findings and verdict of the Court.

D. The evidence does not sustain the findings of the Court.

E. The judgment of the Court is contrary to law.

F. The judgment of the Court is contrary to the evidence.

III.

The Court further finds that the rule of this Court, being rule 3, subdivision 2, reads as follows:

"A specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to be the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charges of the court, the specifications shall set out the part referred to *totidem verbis* whether it be the instruction given, or to the instruction refusde. When the error alleged is to the finding of a court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding."

Rule 6, subdivision- 1 and 3 reads as follows:

"I. All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise

in the record, it must nevertheless be referred to in the assignment of errors, or it will be deemed to be waived.

"III. An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided."

IV.

This Court further finds that the appellant in this case has failed to comply with the express provisions of the rules of this Court relating to the assignment of errors, and the errors assigned as above specified are but general and indefinite. That none of the errors here alleged is sufficiently specific to be entitled to consideration by this Court, and in the absence of a proper assignment of the errors in this case and no error appearing upon the face of the record, the judgment of the court below is affirmed.

By the Court, RICHARD E. SLOAN,
Presiding Judge of the Supreme
Court of the Territory of Arizona.

There is therefore brought up for the consideration of this Court simply the question whether, conceding the findings of the Supreme Court of Arizona to be true and in accordance with full and proper weighing of all the facts, the judgment pronounced by the court below (the Supreme Court of the Territory) was proper, or in the language used by this Court in several cases, whether the court's findings of fact support its judgment or decree.

The reasons for the judgment of the Supreme Court of the Territory are fully stated in its opinion and need not here be elaborated upon. As to whether or not the appellant had complied with the rules of the Supreme Court of the Territory was a proper subject of inquiry of the Supreme Court of the Territory. A non-compliance with the rules of the court as regards the proper assignment of errors is in effect the same as a failure to assign any errors at all, and does not call upon the court to delve into all the evidence and testimony and see if the court below in trying the case made any errors or not. It was the duty of the counsel for appellant to properly assign the errors which he desires reviewed by the appellate court, and if he does not do so, he can not complain of the action of the appellate court in affirming the judgment of the court below there being no errors apparent on the record.

Treat vs. Jemison, 20 Wall. 652.
Clement vs. Hearne, 45 Tex. 415.
Maricopa County vs. Jordan, 60 Pac. 693.
Hutton vs. Reed, 25 Cal. 478.
Watson vs. LeGrand ,etc., 177 Ill. 203 (52 N. E. 317.)
Davis vs. Lang, 153 Ill. 175 (38 N. E. 635.)
Supe vs. Francis, 49 Mich. 266.
Pollock vs. Cohen, 32 Ohio St. 514.
Fox vs. Fox, 96 Pa. St. 60.
Findlay vs. Pertz, 74 Fed. 681.

The rule formulated by the Supreme Court of

the Territory of Arizona which is set out in full in the opinion of that court in this case, speaks for itself. It requires that in the submission of matters for review, the errors complained of must be assigned in the manner in said rule specified, which would put the court in a position to recognize the errors complained of, and not cause it to act as counsel for the appellant in the discovery of errors committed by the court below.

As was said by the Supreme Court of the Territory in its opinion, general assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this Court, and likewise by other courts operating under similar rules, citing authorities in support of their statements, to which we would respectfully call the attention of this Court.

Assignments of errors merely stating that the judgment of the court below is contrary to the evidence or to that effect is universally held to be insufficient:

Clear Creek Gold Co. vs. Root, 1 Colo. 374.
Robins vs. Magee, 96 Ind. 174.
Nading vs. Elliott (Ind.) 36 N. E. 695.
Keokuk Stove Works vs. Hammond, 63 N. W. 563.
International Railway Co. vs. Hinzie, 18 S. W. 681.
Gilberson vs. Miller Min. Co. (Utah) 5 Pac. 699.

Connor vs. Edwards (S. C.) 15 S. E. 796.

Assignments of error to the effect that the evidence does not sustain the judgment or findings of the court are also held uniformly to be insufficient.

Grand Trunk Railway Co. vs. Ives, 144 U. S. 415.
Bass vs. Baker (Mont.) 12 Pac. 922.
Green vs. Gibson (Tex.) 18 S. W. 494.
Spotts vs. Hanley (Cal.) 24 Pac. 738.

It has been the settled rule of this Court that it will adopt the construction and interpretation of the State courts where the meaning or intent of a State's statutes are under consideration, and this Court will not interpret it differently even though it might not agree with the interpretation thereof by the State courts.

Walker vs. State Harbor Com., 17 Wall 648.
Elmendorf vs. Taylor et al., 10 Wheaton 152.
Central Land Company vs. Lindley, 159 U. S. 103.

There is no reason why the same rule should not apply to the interpretation of the rules of practice formulated by State or Territorial courts. They certainly are able to judge of the meaning and intent of their rules of practice and their interpretation of such rules, should be adopted in this Court.

This Court as well as courts of last resort of the States have held that they will refuse to review the decision of a court upon the enforcement or waiver of its rules of practice, except where the rules themselves are in violation of the legal rights of the party appealing. But where the rules are framed in accordance with the exercise of sound discretion and with due regard to their reasonableness, the enforcement of such rules are peculiarly within the discretion of the court making them and the exercise of such discretion will not be reviewed.

See Life Ins. Co. vs. Francisco, 17 Wall (U. S.) 672.

Also in the case of Caples vs. the Central Pacific R. R. Co., reported in the 6th Nevada, star page 265, on 276, where the Court says:

"Rules of court are generally made as much for the convenience of the court as for any other purpose. The courts usually have the power to adopt any rules not in conflict with law. Where they have done so, and they are reasonable, and there appears to be no legal objection to them, there should be no interference by any appellate tribunal with their enforcement. If rules be adopted for the convenience of the court, we apprehend that the court itself has some interest in enforcing them, and may or may not allow counsel to waive their requirements. . . . . We do not feel authorized to interfere with the courts in enforcing their own rules, the rules themselves being legal."

The same conclusion has been arrived at in the following cases, which we submit to this Court:

Lightle vs. Ivancovich, 10 Nevada, 41.
Hagar vs. Mead, 25 California 600.
Funkhouser vs. How, 18 Mo. 47.
State vs. Smith, 44 Mo. 112.
Martine vs. Lowenstine, 68 N. Y. 456.
Wickersham vs. Russell, 51 Pa. St. 71.
Gannon vs. Fritz, 79 Pa. St. 303.
Carpenter vs. Thayer, 15 Vt. 552.
Dolan vs. Stone, 65 Pac. 641.

The cases above cited also clearly establish the fact that the enforcement or waiver of the rules of court are mere matters of discretion, and this Court has repeatedly held that matters of discretion can not be brought here by appeal and will not be reviewed by this Court.

Ayers vs. Watson, 137 U. S. 584.
Bamberger vs. Terry, 103 U. S. 40.
Bullitt Co. vs. Washer, 130 U. S. 142.
Central Trust Co. vs. Grant Locomotive Works, 135 U. S. 207.

We therefore contend that the decision of the Supreme Court of the Territory upon the enforcement of its rules were matters resting wholly within the discretion of that court and are not reviewable in this Court by appeal.

The findings of fact certified to by the Supreme

Court of the Territory to this Court, sets out its rule of practice in regard to the assignment of errors of the trial court. The statement of facts also finds that the appellant did not comply with such rule, setting out the reasons for such a finding, and upon such finding of facts concludes that the court was compelled to affirm the judgment of the court below.

The opinion of the court below (the Supreme Court of the Territory, which sets out the assignment of errors) taken together with its findings of facts embodied in its statement of facts certified to this Court can not fail to support the judgment rendered upon such findings of fact. There was practically nothing before the court which it could review except the record, which the court examined for manifest errors and it finds that there are none. There being no errors apparent on the face of the record, and there being no proper assignment of errors before it, the Supreme Court of the Territory could not do otherwise than affirm the judgment of the court below.

It is therefore respectfully submitted that the court below did not err in rendering its judgment of affirmance, and that the judgment of the Supreme Court of the Territory of Arizona should be affirmed.

C. F. Ainsworth

Attorney for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 25.

JOHN M. WARD, Appellant,

vs.

MOSES H. SHERMAN and DAVID HARDENBERG.

This supplemental brief is occasioned by the fact that appellee's brief was written and filed herein April 14, 1903, on the belief that appellants' brief would be confined to the assignment of errors by him alleged on pages 100 and 101 of the record, but on receiving appellants' brief on April 27, 1903, I find they have argued the case on a different theory than contemplated by appellee, hence this supplemental brief in reply thereto.

The case, on its merits, is a very simple one. The undisputed facts in the case are as follows:

On September 12, 1894, the appellant, John M. Ward, held two notes for $12,500 each, one due October 1, 1894, the other October 1, 1897, each drawing interest at the rate of eight per cent. per annum, interest payably annually, and upon which the interest had been paid to October 1, 1893, and nothing was due on either note until October 1, 1894; both notes were signed by David Hardenberg, and their payment guaranteed by appellee Sherman. These notes were secured by a chattel mortgage executed by David Harden-

berg on a certain band of cattle running on what was known as the Sunflower range, in Maricopa County, Arizona, and for which the notes and mortgage were given to appellant for a portion of the purchase price thereof (Rec., pp. 18, 19, 9, 10, 11). This chattel mortgage provided that in case of default in payment of interest on said notes that the appellant or his assigns could take possession of the mortgage property and sell the same at public auction after giving twenty days' notice and apply the proceeds on the payment thereof (Rec., p. 10). After the notes and mortgage were given, all the property was conveyed by Hardenberg to the Sherman-Hardenberg Cattle Co., subject to the mortgage, of which company Sherman was the principal owner, and thereafter the property was conveyed to the appellee, Sherman (Rec., pp. 67 and 68).

On September 12, 1894, a proposition or agreement, signed by Sherman as president of the cattle company, was submitted to appellant Ward to turn over to Ward all the personal property and real estate purchased by Hardenberg of Ward on condition that he, Ward, deliver up and cancel the two notes and mortgage aforesaid (Rec., pp. 19 and 20), the cattle company having only possession of certain real estate, the title thereto then being in Ward (Rec., p. 50). This proposition was afterwards attempted to be accepted (Rec., p. 23).

On September 29, 1894, appellant Ward took possession of the property on condition that he surrender the notes aforesaid and cancel the mortgage, securing payment of same (Rec., p. 39). On October 8, 1894, a bill of sale was made of some personal property not included in mortgage (Rec., p. 21). No other conveyances or transfers were made to Ward of any of the property except upon the conditions aud as above stated.

On November 28, 1894, Ward then being in possession of

the mortgage property, filed a suit in the District Court of Maricopa County against Sherman and Hardenberg on the $12,500 note aforesaid due October 1, 1894, setting out the note in full in the complaint and praying judgment thereon for $1,500 (Rec., p. 1). On June 12, 1895, appellant Ward filed an affidavit for an attachment for balance due on said note as aforesaid. No attachment, however, was every issued, and the summons was not placed in the hands of the sheriff for service until May 6, 1899, after the second note became due, and on May 6, 1899, was served on appellee Sherman and no service was ever made on the defendant Hardenberg and he did not appear in the case (Rec., p. 12).

The appellee answered, admitted the execution of the note in question and alleged the execution of the second note, and that both of said notes were in possession of appellant Ward and both unpaid. The answer of Sherman by way of counter claim set up that he was the owner of all the property hereinbefore mentioned subject to the mortgage aforesaid and upon which he alleged to be due $25,000 and interest less such amounts as had been received by Ward from sales of portions of said property, and prayed that he be allowed to pay on said indebtedness and redeem said property, (Rec., pp. 5, 6, 7, 8, 10). No reply was filed to the counter claim and on this state of the pleadings the case was tried by the district court, without a jury, neither party demanding a jury.

Appellant on the trial introduced the $12,500 maturing October 1, 1894, *and rested his case* (Rec., p. 78); both notes were presented on the trial by appellant at request of appellee (Rec., p. 80). Judgment was rendered by the trial court for the appellee Sherman and that judgment affirmed by the Supreme Court of the Territory (Rec., pp. 25, 26, 30, and 88, 89).

ARGUMENT ON MERITS.

1. The contract between appellant and the Sherman-Hardenberg Cattle Company (Tr., pp. 18, 19), by which appellant was to take back the property and cancel the mortgage and turn over the notes to Sherman and Hardenberg, was an entire contract, and the breach of any part of it was a breach of the whole, and abrogated the contract, leaving the parties to it, or their successors in interest in the same position as if the contract had never been made. Appellant's action in not canceling the mortgage, and in not turning over the notes, and in bringing suit on one of the notes, was a violation of this contract, and abrogated it entirely.

2. Appellant being in possession of the property, and the contract under which he went into possession being abrogated, and the parties in *statu quo*, appellant was holding the property as a mortgagee in possession and was subject to all the liabilities of a mortgagee in possession.

3. A mortgagee in possession of property, before foreclosure, is liable to have the property redeemed at any time and on such redemption is liable to the mortgagor for the profits of the property; and, if the property is at any time sought to be redeemed by the mortgagor, or his successors in interest, any profits that may have accrued in the meantime must be applied by the mortgagee on the mortgage debt; and any surplus above the mortgage debt must be turned back with the property itself to the mortgagor, or his successors, who have redeemed.

4. In this case, the appellee Sherman was really the mortgagor of the property, though it was held in another name; and in any event he is the successor in interest of the mortgagor, and owns all the rights of redemption.

5. An accounting was made by the court and appellant allowed all he claimed $25,000 principal, $12,333 interest from October 1, 1893, his entire expenses claimed for those years $16,000, making a total of $53,333, and therefore was not injured by the decree of the trial court.

1. We will consider the first proposition, that this contract was an entire contract, and appellant having failed to carry out his part of the agreement, the contract was abrogated entirely.

This contract was an entire contract; each part of it was common to the other, and interdependent upon it. The property was to go back to the appellant upon consideration of his canceling the mortgage and returning to Sherman and Hardenberg the notes on which Sherman was liable. Except such as had been sold since September 1, 1894, and for that the company should account.

Am. & Eng. En. of Law (2nd Ed.), Vol. 7, p. 95.

> "A contract is entire when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provisions and the considerations, are common each to the other and interdependent."

> "If the contract is for the sale of several distinct things, but all for one consideration, it is entire."

Haslack *vs.* Myers, 26 N. J. L., 284.

> "A contract to trade a grocery stock for land, stock and notes, is entire."

There could be no question about the contract in the present case being entire; but the few authorities are cited to make assurance doubly sure.

The contract, then, being an entire one, the rule of law is that a breach of any part of it nullifies the whole con-

tract, and it may be treated by the other party as entirely at an end, and just as if never made.

Am. & Eng. En. of Law (2nd Ed.), Vol. 7, p. 150.

> "If the contract is entire, a breach as to a single material point discharges the whole, relieving the other party from performance and affording him an immediate right of action to enforce the whole obligation."
>
> Cockley *vs.* Brucker, 54 Ohio St., 214.

This principle of law is also so well defined and clear that it is unnecessary to cite more authorities upon it.

It follows, then, that as the contract between Ward and the Sherman-Hardenberg Cattle Company by which Ward was to go back into possession of the property, and cancel the mortgage and return the notes to Sherman and Hardenberg for which Sherman was liable, was an entire one; and as Ward has broken it in a material part by failing to cancel mortgage or to return the notes and by bringing this action on one of the notes, Sherman, for whose benefit the contract was made, could treat that contract as entirely nullified, and proceed to redeem the property, just as if he had never agreed that the mortgage should be canceled and Ward go back into possession and ownership of the property.

It makes no difference that appellant claims that part of the property contracted to be turned over to him was not turned over. (As a matter of fact, the Desert Wells property, for which he got $500, was turned over to him, although it was not included in the contract.)

If all the property had not been turned over to him, the appellant had the option, first, to take what was turned over to him, carry out his part of the contract by canceling the mortgage and turning over the notes, and then suing the Sherman-Hardenberg Cattle Company for the proceeds

of sales made by it after September 1, 1894, if the proceeds of any such sales were not accounted for as provided in the contract of September 12, 1894 (Transcript, p. 19), (as that contract expressly contemplated that some of the stock cattle had been sold subsequent to September 1, 1894, and this was to be accounted for by the Sherman-Hardenberg Cattle Company, but the notes were to be delivered and the mortgage canceled on the delivery of the property contemplated by the contract, viz: that not sold after September 1, 1894;) or, second, to repudiate the contract and bring suit to foreclose the mortgage, and recover personal judgments against Hardenberg, the maker of the notes, and Sherman, the guarantor. Appellant might have pursued either one of these courses, and been strictly within his rights, and obtained relief for any wrong done him. But he did not pursue either. He adopted a third course, which was to repudiate the contract after getting in possession of the property, as his mortgage provided that when the notes or interest were due and unpaid he could take possession of the property. One note being due he brought suit on it, holding the other, not then due, until the trial of this action, when they were both produced in court as unpaid.

In other words, the plaintiff, by this suit, has unqualifiedly repudiated the contract of September 12, 1894, and treated it as abrogated; because he held the notes and mortgage as legal owner; he brought this suit upon the first note, upon the legal liability shown by it, against the makee and guarantor (Tr., p. 1); and still holds the other note.

The colloquy between counsel and court, on the trial (Tr., pp. 40, 41 and 42), shows the exact situation as claimed by appellee, and admitted by appellant; that the claim made by plaintiff, and the only claim in the suit, by pleading and proof, was the first note of $12,500; that after introducing

the note the plaintiff rested his case (Tr., p. 42). "Mr. KIBBEY: That is our case, if your Honor please."

It seems to us absolutely beyond question that appellant in pursuing this course repudiated and abrogated entirely his contract, and placed the parties in the same position as if it had never been made. This being so and the contract being abrogated, the question arises what were the respective rights and liabilities of the parties, and this brings us to consider our second proposition.

2. Appellant taking possession of the property, and the contract under which he went into possession being repudiated and abrogated by him, and the parties in *statu quo*, appellant was holding the property as a mortgagee in possession, and subject to the liabilities of such a holding.

Appellant held only a mortgage on the property. The mortgage had not been foreclosed, and therefore was still subsisting only as a mortgage.

The mortgage was to be canceled and the notes returned by the appellant. This was not done, and never has been done, and is now expressly repudiated by appellant, so that the mortgage never was cancelled and is still in full effect, and has so been all the time.

As this is important, let us put it another way.

As found by the trial court in the "Findings of Fact," etc. (Tr, p. 27), plaintiff below held both notes and the mortgage uncanceled and was insisting upon his rights as legal holder of unpaid notes.

"That the contract of September 12, 1894, was never carried out by plaintiff, but that he took possession of all the property of the Sherman-Hardenberg Cattle Co. about October 1, 1894; that he never turned over, delivered or canceled said notes or either of them or satisfied or discharged the chattel

mortgage securing the same, and that, on the contrary, he brought suit on one of the notes for the collection of a portion that he claimed to be due thereon."

In that state of case, not only "found" by the trial court, but never questioned in this record, where was the *legal title* to the property?

Unquestionably, in Sherman.

What rights had Ward in the cattle?

Equally certain, those of a lienholder, under his mortgage, for the legal title of Sherman could not be divested, except by foreclosure of the mortgage.

Therefore, it is apparent that Ward was not in possession of the property in any other way, or under any other title, than as a mortgagee in possession.

This leads us to a consideration of the rights and liabilities of a mortgagee in possession.

3. A mortgagee in possession of property is liable to have the property redeemed at any time and on such redemption he is liable to the mortgagor for the profits; and if the property is sought to be redeemed by the mortgagor, or his assignee, any profits that may have accrued in the meantime must be applied by the mortgagee on the mortgage debt; and any surplus above the mortgage debt must be turned back with the property to the mortgagor, or his successors, who have redeemed.

If the mortgage has not been foreclosed the mortgagee who is in possession is so in possession simply to protect the security for his debt, and his duty is to take care of the property, and to apply it on his mortgage debt. For any excess of profits he is liable to the mortgagor. And if the latter seeks to redeem, the mortgagee in possession must render an account of the profits, and apply them on the mortgage debt.

The following authorities will fully support these propositions:

Cobbey on Chattel Mortgages, par. 1027:

"A mortgagor of chattels, or those who claim through him, as his creditors, may redeem the property by paying the mortgage debt at any time after it is due, and before sale. * * * A purchaser from the mortgagor acquires his right of redemption." (Citing Scott *vs.* Henry, 13 Ark., 198.)

Brink *vs.* Freoff, 40 Mich., 611:

"A mortgagor of chattels or claimants under him, such as his creditors or assigns, have the right to redeem the property by paying the debt when due and before sale."

Wilson *vs.* Brannan, 27 Cal., 259:

"The mortgagor of personal property has an equity of redemption in the mortgage property after the conditions of the mortgage are broken, which he may assert by paying the debt and redeeming the property at any time before this equity of redemption has been cut off by a foreclosure or sale at auction."

Herman on Chattel Mortgages, par. 194:

"* * * And even where the mortgagor, in accordance with the terms of the instrument, delivers possession of the property to the mortgagee after breach of condition, it will not vest the absolute ownership in the mortgagee or free it from the mortgagor's right of redemption. * * * If the mortgagee take and retain possession of the mortgaged property, the property is always liable to redemption. When the mortgagee's debt is satisfied, his title ceases, and before the right of redemption is barred, the mortgagor has an assignable interest.

Strang *vs.* Allen, 44 Ill., 428:

In this case, there were two mortgages of the property. The prior one was foreclosed, without making the junior one a party, and the prior mortgagee went into possession (or rather his assignee). The junior one then sought to redeem, and was allowed to do so; and it was held that the prior mortgagee, having gone into possession under a foreclosure which was void as to the junior mortgagee, had the status merely of a "mortgagee in possession" and therefore was liable for the rents and profits during the time he was in possession, and that these profits should be applied on his mortgage debt. The court said in part:

> "They (the prior mortgagee), however, obtained possession of the premises and received rents and profits from the use of the property; and only being in possession as assignees of Chamberlain's mortgage, they were in possession precisely as if the mortgagee had entered under his mortgage. *And a mortgagee in possession is always liable to account for the rents and profits received over and above necessary repairs and taxes.*
>
> "Plaintiffs in error, representing the mortgagee while in possession, were liable to thus account for the rents and profits. * * * They should be charged with the rents and profits of the property received by them, after deducting all reasonable charges for repairs and for taxes and assessments paid on the property."

This case cited is a case where the mortgagee was in possession under a foreclosure; but as it happened the foreclosure was not binding against a junior mortgagee. Therefore, it was held as to him that the first mortgagee was merely in the position of a mortgagee in possession, and liable to account for the rents and profits.

The analogy to the present case is very strong. In the case at bar, the mortgagee is in possession by consent of the assignee of the mortgagor under a contract; but, as it hap-

pens, by his own failure to perform his part of the contract; by repudiating her agreement, and insisting that the notes still stand as a legal claim against the maker and guarantor, and bringing this suit upon the note, the mortgagee has failed to cut off the equity of redemption of the mortgagee or its assigns (just as in the case cited, by a failure in the foreclosure proceedings to include the junior mortgagee, the prior mortgagee failed to secure the full legal title); so that in this case it is equally plain that the mortgagee should be held to be merely a mortgagee in possession, and should be held liable for the profits, which should be credited on the amount which the mortgagor now will have to pay to redeem.

Another case to the same effect is

Long *vs.* Richards (Mass.), 48 N. E., 1083:

In this case there were two mortgages. The first mortgage was foreclosed; but in the notice of sale the property was stated to be subject to large mortgages; this was not true. The holder of the first mortgage bid the property in. After he had held it for some time, the junior mortgagee sought to redeem it; and he was allowed to do so, the court holding that the foreclosure was voidable by him. The court also held that he was entitled to an accounting from the first mortgagee, and that all rents and profits received by the first mortgagee while in possession should be credited on the amount necessary to redeem. The court said in part:

> "But when we are bound, however much we may hesitate in our belief, to assume bad faith on the mortgagee's part throughout the whole transaction, we cannot say that the master erred in holding him liable for what he might have made by reasonable diligence.

> "The same answer may be made when it is argued that the defendant, having sold the premises, and bought them in at the foreclosure sale, was holding as owner, and supposed himself to be the owner, owing no one any duty of diligence, and therefore should not be held to account for more than he actually received. If he had practiced a wrong on the plaintiff, the fact that he supposed his wrong to be effectual gives him no equity. It still is true, that, in contemplation of law, he was not the owner, and had no honest reason to think that he was if he did so. His own title to possession as against the plaintiff was as holder of a prior mortgage, and he must account according to his title."

This was a much stronger case than the present one. Here the mortgagee was in poseession under good "color of title," as there had been a foreclosure of the property and sale to him. But the sale was voidable by the junior mortgagee, because the notice of sale had stated falsely that there were other heavy mortgages against the property. Therefore, although the first mortgagee claimed to hold as owner, the court held that he, having wronged the junior mortgagee, could only hold as mortgagee in possession. The defendant did not even dispute that he was liable for the profits he had actually received; but only that he was not answerable for what he might have made by reasonable diligence. But the court held not only that he was accountable for what he had actually made, but also for what he might have made with due diligence.

In the present case, the mortgagee not only has wronged the mortgagor by taking possession and then failing to keep his contract, but he is in possession without even a colorable title.

Another case is

Swegle *vs.* Belle *et al.* (Oregon), 25 Pac., 633.

In this case a deed absolute on its face had been given as a mortgage really to secure the payment of money.

The plaintiff, alleging this fact, brought suit to redeem.

The fact was proved by parol testimony, on the trial.

Then the plaintiff demanded that the amounts of the rents and profits that the defendant received from the land, during his occupation, should be credited on the mortgage debt necessary to redeem.

The court held that, as the defendant held possession merely as a mortgagee in possession, he was liable for the rents and profits. And it also held, that as the amount of these rents and profits were uncertain, until the defendant accounted, the plaintiff need not make any tender in order to redeem.

Here is the same point decided, that the mortgagee in possession must account to the mortgagor for the rents and credit them on the mortgage debt; and the additional point that the plaintiff need not allege a tender. This would necessarily be true, as the court says, for he does not know what the amount which he is entitled to be credited is until an accounting is had.

From the authorities cited there can be no question but that a mortgagee in possession of the mortgaged property, before foreclosure, or, in fact, unless he has the actual legal title in himself, must account to the mortgagor, when the mortgagor seeks to redeem, for the rents and profits he has received, and credit them on the mortgage debt.

There can be no question, either, both on principle and from the analogous cases cited, that the appellant in this case is in just the position of a mortgagee in possession.

The appellee had a perfect right to waive the irregular method in which the property was sold by appellant, and

hold appellant as trustee of the price received, beyond the amount necessary to pay the mortgage indebtedness.

Lea *vs.* Fox, *supra.*
Davenport *vs.* McChesney, 86 N. Y., 242.
Jones on Chattel Mortgages, Sec. 696.
Martin *vs.* Jenkins *et al.* (S. C.), 27 S. E., 947.
Metzler *et al. vs.* James (Col.), 19 Pac., 885.
Mowry *vs.* Bank (Wis.), 11 N. W., 247.
Wann *vs.* Coe, 31 Fed., 369.

4. Appellee Sherman is the legal owner of the right to redeem this property.

This is shown by the testimony of the appellee Sherman at pages 67–68 of the Record, where he testifies that all the interest of David Hardenberg and the Sherman-Hardenberg Cattle Company in this property had been assigned to him.

Furthermore the evidence shows throughout that Sherman was the real purchaser of the property, the one who laid out all the money on the property, and the one for whose benefit the purchase and mortgage back to appellant was made. This being so, the well established rule would apply, that a party for whose benefit a contract is made may claim under it and enforce it in any manner.

Am. & Eng. En. of Law, Vol. 3, p. 863, and cases cited.

The mortgage contract having been made for the benefit of Sherman, he can redeem from that mortgage.

5. The accounting asked for in this case was only incident to the right of relief vested in appellee under the facts as shown by the record, the taking of which by the Judge himself was complete and clearly authorized by law. The following case is directly in point on this proposition.

Emery *vs.* Mason (Cal., 1888), 16 Pac., 894:

> "It is insisted by appellant that, notwithstanding the findings, the superior court should have ordered an accounting; that the only way in which it could be ascertained that Charles G. Mason did not make or receive any advantageous benefit from the money, tools and provisions supplied to him by the plaintiff was by an accounting. But, as the court found nothing was acquired during the prospecting tour, there was no necessity for a decretal order referring the cause for the taking of an account. *Moreover, when an accounting is prayed, the court may itself take or state the account;* and it would be difficult to state one in the present action more clearly than by ascertaining and declaring upon the evidence that there was no profit, return, money, or property acquired by the deceased under the contract set forth in the complaint, to be charged against his estate."

This case is an exact authority for the contention of the appellee in the case at bar, and we believe clearly states the reasonable doctrine on this point.

Other cases which hold that the court itself may on the trial examine into the state of the accounts and state the account itself, without making an interlocutory order for an accounting are the following:

Jewett *vs.* Cunard (Circuit Court, District of Maine), Federal Cases, No. 7310, Vol. 13.
Wheeler *vs.* Billings, 72 Fed. Rep., 301.
Pierce *vs.* Thompson, 23 Mass., 193, 196.

The trial court rendered its accounting on the statement of appellant over his own signature for the years 1895, 1896, 1897 and 1898, and for 1899 it is based partly on appellant's statement and other witnesses, giving appellant full credit for all he claimed, allowing him his $25,000 principal and interest at 8 per cent. from October 1, 1893, to date of trial,

amounting to $12,333; also $3,200 for each year for five years, amounting to $16,000, which, as stated by appellant, included all expenses (Rec., pp. 22 and 23). Appellant was a witness in his own behalf, and also for appellee, and nowhere does he state that the statement made by him on April 18, 1899, was not absolutely correct in every particular, and so far as we are advised no one has ever claimed that appellant's statement was not correct.

Noticing the brief of appellant, the first point presented is, that the counter-claim by defendant below was improperly considered by the trial court.

Before discussing the legal phase, it should be noticed that the complaint by plaintiff counted on the legal liability of the defendant upon an unpaid promissory note (Tr, p. 1).

The answer was duly and regularly filed; admitting the residence of parties as alleged; admits the making and guaranty of the note as claimed; and then alleges not only the defense to the note, but defendant's claim to a judgment over because of transactions stated directly connected with and by the acts of the parties made part of the legal relations of both to the note sued on.

Technically it was called and was a "counter-claim."

We shall insist it was perfectly regular; but it was the pleading of the defendant; it was not objected to by plaintiff in the trial court; no demurrer, or exception was filed to it; the cause was tried upon the merits under it; the evidence offered by defendant under it and by plaintiff as to it, was received by the court, without objection made by plaintiff.

No point was made as to it in the motion for new trial in the district court (Tr, p. 24).

Nor was the regularity of the pleading questioned in the supreme court of the Territory, and therefore cannot be, for the first time, properly raised here.

But on the merits of the question, the appellant raises the point that the complaint stating merely a law action, the counter-claim seeking equitable relief should not have been allowed.

None of the sections of the Revised Statutes of 1887 cited by appellant in his brief on page 14 have any bearing on the subject one way or another, they all being applicable to particular kinds of actions, or do not affect the question at all.

Section 741 of the R. S. 1887 (Arizona) alone is sufficient to sustain the granting of equitable relief upon a counter-claim to a law action. It must be remembered that the note sued on was one of series given in conjunction with a mortgage of certain property securing the payment of such notes. When the suit was brought on the note, there was either of two courses open for the appellee, who was not only surety on the notes but also successor in interest to the mortgager of the mortgaged property. First, he could pay the note and all unpaid balances due on the mortgaged debt and thus redeem the property from the mortgage and demand an accounting by a separate suit; or second, he could in the suit upon the mortgage debt demand an accounting and apply the amount realized by the mortgagee in possession upon the sale of part of the mortgaged property, upon the mortgage debt, and upon such application of such funds redeem the property from the mortgage and secure the payment to him of the overplus, by the mortgagee. In either event the cancellation and surrender of the notes would have been incidental relief inasmuch as the mortgaged debt was evidenced by the notes, and the payment of such debts would be a discharge of the liability on the notes. It is

very evident that inasmuch as the appellee's liability on the notes was limited to the amount actually due the payee and mortgagee, the accounting for moneys derived by the mortgagee while in possession of the property and retained by him (which either fully or partly paid the debt existing on the notes) is certainly "incident to" and "connected with" plaintiff's cause of action.

While it is true that the relief prayed for in the counter-claim might have been secured in a separate equity suit, the general authority of Section 741 R. S. (Arizona), 1887, above referred to permits the adjustment of all differences between the parties, where they have an incidental relation or some connection with the plaintiff's cause of action. Under the provisions of this section the counter-claim need not "grow out" of plaintiff's cause of action, as is the rule of some of the States, but a mere incidental relation or connection to it, so much so that an adjudication of the one would affect the other, is sufficient. The notes are but mere evidences of the mortgage debt; the payment of the one extinguishes the other. Where the claim is that the mortgagee in possession has already paid himself the full amount or even part of the mortgaged debt and to that extent discharged the makers and sureties on the note, such claim is incidental to and connected with the plaintiff's claim on the notes inasmuch as plaintiff's right to recover on the notes is materially affected thereby and under Section 741 such claim should be and could be shown and the differences of the parties adjusted in one suit.

While it is true Chapter 48 of the Laws of 1877 of Arizona was repealed by Section 3257 of the Revision of 1887, yet, a new provision was made for the same purpose and is contained, substantially, in the following section:

> Sec. 653. "The pleadings in all civil suits in courts of record shall be by complaint and answer."

Sec. 793. "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."

It follows from the above sections that the legislature very plainly expressed their intention to disregard the distinction between suits in equity and actions at law, not only as to the mode of bringing them before the court, but also in the granting of relief, and provided that all actions should be brought in the same manner and also that the same court may in the same action give either legal or equitable or both kinds of relief according to the demands of the occasion.

The procedure and pleadings in the lower court are beyond objection. It is not only reasonable and desirable as to result, but they are free from complications, and in view of the section above cited, there can be no valid objection thereto. By this method, we avoid bringing a separate suit for an accounting and redemption, which, as it necessarily would have been between the same parties and bear upon the amount recoverable upon the note, could, and no doubt would, have been consolidated and tried together or in conjunction, under the authority of Sections 741 and 918 R. S., Ariz., 1887, and the decree and judgment framed according to the equities of the parties in both suits. Section 741, above referred to, is a general one, regarding counter-claims, and makes no distinction between equitable and legal counter-claims, but limits them to such as are incident to or connected with plaintiff's cause of action. The cause of action, or rather, counter-claim of the appellee, coming as it does so clearly within the provisions of that section, we cannot understand the force of appellant's contention, and we respectfully submit that the objection is unfounded and not worthy of even serious thought.

But be that as it may, we submit that it is a rather late day to raise such a technical objection, based upon alleged irregularities in the pleadings. First, because of the provisions of Section 673, R. S., Arizona (1887), which is as follows:

> "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Under this provision the district court itself could not reverse the judgment, even admitting that the contention of the appellant is sound and correct, and this Court ought, therefore, not interfere and do that which the court below was strictly enjoined by the legislature from doing.

Second, because this Court has so often held that all matters of procedure and pleading in the lower courts are within the discretion and control of that court (except where the constitutional rights of the parties are concerned), and the exercise of such discretion will not be reviewed by this Court. Whether or not the actions were properly submittable at the same time, or should have been separated, is a mere matter of procedure, and there being no provisions of law to prohibit it, the Court either could have permitted the pleadings to stand as they were or forced the counter-claim out of the case, and appropriate proceedings could have been begun in time to reach the result desired, to wit, a complete adjustment of the questions involved. But that question was not raised until the matter was brought before this Court; the parties proceeding to trial and judgment and to judgment of the supreme court of the Territory without raising that question, and we submit that the objection of the appellant is too late to receive the attention of this Court. This Court had time and time again decided that points which were

not raised in the court below cannot for the first time be raised in this Court, and we submit that inasmuch as neither the trial court's attention was called to this point, nor that of the supreme court, and some action taken at such time, the objection of the appellant on this matter of mere practice is not reviewable and should not be considered at this time.

In the case of Robinson *vs.* Belt, 187 U. S., 41, this Court in the course of its opinion said (on page 50):

> "It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. * * * While it is the duty of this Court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this Court has evolved from the record. It is not the province of this Court to retry these cases *de novo*."

This Court expressed itself similarly in the following cases:

Ankeney *vs.* Clark, 148 U. S., 345.
Alexander *vs.* U. S., 355.
Street Railway *vs.* Hart, 114 U. S., 654 on 662.
Marine Bank *vs.* Fulton Bank, 2 Wall., 252.
The Caroline, 9 Wheaton, 386.

We therefore submit that this point raised by the appellant is not only without merit, but at this late day is not entitled to any consideration.

As to the various assignments of error in appellant's brief, we desire to say that had they been assigned in the court below they would have no doubt received the consideration due them, but they all raise questions not determinable at this late day nor by this Court.

CONCLUSION.

It is clear from the record in this case that the appellant has in this judgment recovered not only his entire debt, but he has recovered also all of his costs and expenses. Yes, even more than this. The trial court was more than generous to the appellant, for the rule of law is well settled that whenever a mortgagee in possession disposes of property enough to pay off his mortgage, then his title to the remainder of the property ceases. (Freeman *vs.* Freeman, 17 N. J. Eq., 44.) Had this rule been applied in this case to the appellant, the appellee's judgment would have been for considerably more; but the court allowed the appellant interest on $25,000 up to the date of the trial. The interest should have only been allowed to the time the appellant had sold and disposed of enough property to pay the mortgage debt, which was nearly a year and a half before the trial.

The appellant not having been wronged in the slightest degree, and having received all of his principal, interest and expenses, it is no more than fair and equitable that the party who made this possible, and who has expended large sums of money (over $20,000) in the improvement of this ranch and property, should have returned to him at least a portion of it.

We therefore submit upon the record in this case, and the authorities cited, that the judgment of the lower court should be affirmed.

Respectfully submitted,

C. F. AINSWORTH,

Attorney for Appellee M. H. Sherman.

L. E. PAYSON,

Of Counsel.

Supreme Court of the United States.

No. 25.—October Term, 1903.

John M. Ward, Appellant,
vs.
Moses H. Sherman and David Hardenberg.
} Appeal from the Supreme Court of the Territory of Arizona.

[January 11, 1904.]

The facts in this case are few and beyond dispute, most of them being shown by the averments in the answer of the defendant Sherman. On August 23, 1889, Ward, the plaintiff and appellant, sold to the defendants the Sunflower range, together with the cattle thereon and other personal property. A conveyance was by agreement made to the defendant Hardenberg, who, to secure a part of the purchase price, to wit, $25,000, evidenced by two notes of $12,500 each, made by Hardenberg and guaranteed by Sherman, executed a mortgage of the cattle and some other property. Thereafter the defendants incorporated themselves under the laws of the Territory of Arizona as the Sherman-Hardenberg Cattle Company, and transferred to it all of the property above mentioned, subject to the payment of the two notes held by the plaintiff. On September 12, 1894, an agreement was entered into between the company and the plaintiff which, after reciting the indebtedness, reads as follows:

"Whereas, the said party of the second part is unable to pay to said party of the first part the said sum of $14,500 due on October 1, 1894, and has notified said party of the first part that it will be unable to pay said sum at said time; and

"Whereas, said party of the second part desires to deliver up and turn over to said party of the first part all of the property heretofore purchased by one David Hardenberg of the party of the first part, and for which said notes were given as a part of the purchase money:

"Now, therefore, in consideration of the promises and agreements of said party of the first part, the said party of the second part hereby agrees to and with said party of the first part to transfer and convey by proper deeds of conveyance and bills of sale all of the real and personal property heretofore purchased by the said David Hardenberg of the said party of the first part; also, all personal and real property owned by the said party of the second part in the Territory of Arizona, in whomsoever's name the same may now stand, to said party of the first part, and more particularly described as follows, to wit: The Sunflower Cattle Range in Maricopa County, Arizona Territory; all cattle, horses, mules or burros branded with either of the following brands: Diamond brand, thus: ◇; H. B. brand, thus: HB; also all wagons, mowing machines, farming implements and camp outfit, and everything pertaining to or used by said Sherman-Hardenberg Cattle Company, excepting only from the provision of said

conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part.

"That in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to said David Hardenberg and one M. H. Sherman two promissory notes, each for $12,500, one of which matures on October 1, 1894, and one of which matures on October 1, 1897, heretofore executed by the said Hardenberg and Sherman to the party of the first part; also to release the said Hardenberg and Sherman from the payment of all interest due thereon, and to cancel and discharge a certain chattel mortgage executed by the said David Hardenberg to the said party of the first part, for the purpose of securing the payment of said notes, which said mortgage is now on file and of record in the office of the county recorder of Maricopa County, in the Territory of Arizona.

"In witness whereof, the said party of the second part, The Sherman, Hardenberg Cattle Company, has executed these presents in its corporate name, by its president, and the said party of the first part has executed these presents the day and year first above written."

The following instrument was also executed:

"PHOENIX, ARIZONA, *Sept.* 29, 1894.

To J. M. WARD, Esq.:

"The Sherman-Hardenberg Cattle Company hereby authorizes you to enter upon and take possession of all the property belonging to the Sherman-Hardenberg Cattle Company, in accordance with and as described in that certain contract entered into by and between the Sherman-Hardenberg Cattle Company and yourself, bearing date on the 12th day of September, A. D. 1894.

"That on receipt of said property you are to turn over to the Sherman-Hardenberg Cattle Company, at the office of C. F. Ainsworth in Phoenix, Arizona, the notes described in the contract, and also to cancel the chattel mortgage held by you on the property therein referred to.

THE SHERMAN-HARDENBERG CATTLE CO.,
By C. F. AINSWORTH, *Its Secretary.*

"I hereby authorize H. C. Ward as my agent to rec. the above described property for me.

J. M. WARD."

All the property mentioned in this agreement was turned over to Ward except, as he claimed, 104 head of cattle. Ward retained possession of the property and managed it as his own, but did not cancel the mortgage or surrender the notes, insisting that he was entitled to receive the 104 head of cattle or else their value.

On June 12, 1895, he commenced an action in the District Court for the county of Maricopa, in which he set forth a copy of the first of the notes,

and alleged that there was due thereon the sum of $1,500. At the same time he filed an affidavit for an attachment, in which he averred that the payment of the note was not secured by mortgage or lien upon any real or personal property, or any pledge of personal property, and that the amount due was $1,500. No property was attached and no service of process made until May 6, 1899, and then only on the defendant Sherman, who thereupon filed an answer and counterclaim, which was in the nature of a cross-bill in equity, in which he set up the purchase from Ward, the organization of the company, the transfer to the company of the property purchased and the agreement for the delivery of the property to Ward and the return of the notes and cancellation of the mortgage, and alleged that though the property had been delivered the notes had not been returned nor the mortgage cancelled. He also alleged a transfer by the company to himself of all its rights and claims.

The trial court found the facts as above stated in respect to the original transactions between Ward and defendants, the organization of the company, the transfer to it and by it to Sherman; and, further, in reference to the transaction between the company and Ward in 1894 it found as follows:

"5. That during the month of September, 1894, and before the maturity of the first note, the Sherman-Hardenberg Cattle Company attempted to make a settlement with the plaintiff, by agreeing to turn over to him the Sunflower range, all the cattle then on the range, also the desert wells, and other property which it had, which was not included in the mortgage, on condition that said plaintiff turn over and deliver up the two notes aforesaid, with the interest thereon, and cancel and satisfy the mortgage securing the same.

"6. That this contract was never carried out on the part of the plaintiff; but that acting under it he took possession of all the property of the Sherman-Hardenberg Cattle Company, as aforesaid, on or about October 1, 1894; but never turned over, delivered or cancelled said notes, or either of them, or satisfied or discharged the chattel mortgage securing the same. And that, on the contrary, he brought suit on one of said notes for the collection of a portion that he claimed to be due thereon. At the time he brought this suit on the note maturing October 1, 1894, the other note had not matured."

It thereupon adjudged that Ward was a mortgagee in possession, and after finding the disposition which he had made of the property entered a judgment in favor of the defendant Sherman for $17,173.50, and decreed the cancellation of the notes and mortgage.

By section 1 of an act of the Territorial assembly, (Laws Arizona, 1897, p. 127,) it is provided that in a case appealed to the Supreme Court of the Territory the appellant may have the testimony taken in the trial transcribed and certified by the court reporter, and filed with the papers in the case, and that thereupon it shall "become and be a part of the

record in said cause;" and be transmitted to the Supreme Court of the Territory with the other papers in the case. That was done in this case, and part of the record taken to the Supreme Court of the Territory and brought here is the duly certified transcript of the testimony taken on the trial.

Section 2 of that act also provides that it shall not be necessary "to file with the Supreme Court any *transcript, assignment* of errors or other papers except as herein provided." Section 3 requires the plaintiff in error, or appellant, to make an abstract of the record for the benefit of the opposite party and the Supreme Court. Sections 4 and 5 are as follows:

"SEC. 4. Each party shall prepare and print or typewrite an argument of the points and authorities relied on. The briefs of both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the printed abstract by folios and sufficient to dispense with the reading of the printed abstract on the argument. The brief of the plaintiff in error or appellant shall also next contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived. It shall not be necessary to assign or file any assignment of errors in the court below or Supreme Court, except those assigned in the brief of the plaintiff in error or appellant.

"SEC. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of errors except as herein provided."

The record discloses that in the Supreme Court the appellee moved to strike from the files appellant's abstract of record. No action appears to have been taken upon this motion. The record also discloses that leave was given to the appellant to file a supplemental brief. Neither the original nor the supplemental brief, if one was filed, is before us.

Mr. Justice BREWER delivered the opinion of the Court.

The Supreme Court of the Territory, without considering the merits of the case, affirmed the judgment on the ground that the assignment of errors was insufficient, citing in its opinion from a rule of practice which had been prescribed by it and in force for many years; "All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. . . . An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided." Undoubtedly the assignment of errors was general in its terms. An application was made to the Supreme Court for leave to amend the assignment of errors, but it was denied. In a short *per curiam* opinion that court, after condemning the assignments as insufficient, said:

"The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed."

We shall not stop to inquire whether the court erred in refusing to permit an amendment of the assignment of errors, but accepting its conclusion that the failure to make proper assignments is "a waiver of all errors which are not fundamental," and bearing in mind the provisions of section 5 of the statute of 1897, that all rulings made by the court below in opposition to the plaintiff or appellant are to be taken as excepted to, we proceed to inquire whether there was not a fundamental error which should have been corrected by the Supreme Court. We are of opinion that there was. It may be assumed, as no objection was made on that account, that the counter claim, which was in its nature a bill in equity for the redemption of the mortgaged property, was properly filed in this action to recover money. Can such a bill be sustained under the circumstances disclosed by the answer? It appears from that answer that the property was turned over to Ward to hold, not as mortgagee, but under a contract by which he was to take the property in satisfaction of the debt, cancel the mortgage and return the notes. In other words, according to the averments of the answer a contract of sale was made by the company to Ward, and under the contract of sale Ward took possession. Now, even if it be conceded that Ward's failure to perform was such a breach of the contract as entitled the company to rescind and thereafter to treat Ward as a mortgagee in possession, a bill in equity to enforce such a decision must be presented within a reasonable time. The right to rescind is an affirmative right, asserted by the vendor, the former mortgagor, and, being such, it must be asserted by him within a reasonable time. The answer alleges that on or about October 1, 1895, this agreement was made and the property delivered, but it was not filed until May 16, 1899, more than three years and a half thereafter. During all that time, Ward was in possession of the property, managing and dealing with it as his own. Can it be that a vendor can wait three years and a half, permit the vendee to deal with the property as his own—that property being of a value variable from year to year and requiring constant care to make it prosperous—give his time and labor to its management, take the chances of rise or fall in the market, and then, if it turns out that the business has been prosperous through his efforts, insist on account of some technical failure upon a rescission of the contract, and that the party who has been supposing himself the owner, and acting as such, shall be treated as a mortgagee in possession, and held to account

for the success of his business efforts? In Pollock's Principles of Contracts, p. 515, the author says:

"The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived."

See also *Grymes* v. *Sanders*, (93 U. S. 562;) *McLean* v. *Clapp*, (141 U. S. 429, 432.)

But was there any ground for the rescission of the contract? There was no fraud, mistake or false representations. There is no suggestion that the contract was not entered into with full knowledge or that it was unfair in any of its details. The complaint merely is that Ward was guilty of a breach of one of its stipulations. If so, the company was entitled to damages for that breach, but no damages are shown. The company paid nothing; has lost nothing. So far as disclosed it went out of business, and therefore the failure to release the mortgage could not have injured its business credit. But whatever may be the rights, other than a simple claim of damages for breach of contract, possessed by the company and transferred by it to the defendant Sherman, they are equitable in their nature, and in respect to them the general doctrine of laches applies. We have often had occasion to consider the question of laches. In *Galliher* v. *Caldwell*, (145 U. S. 368, 373,) and *Penn Mutual Life Insurance Company* v. *Austin*, (168 U. S. 685,) are collected the decisions of the court. In the former of these cases it is said (p. 372).

"They (the adjudicated cases) proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

And again (p. 373):

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

And in the last case (p. 698):

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

Apply these considerations to the case at bar. The property was turned over on a contract of sale. Ward was left in possession for over three years and a half without a suggestion of any claim that he was only a mortgagee in possession. He had a right to believe that he was the owner. If the contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own. He gave his time, skill and labor to the work of caring for it. It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill and labor, and give it to the mortgagor, who all those years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of laches applies with force, and that upon the pleadings the court should have adjudged the defendant not entitled either to a rescission of the contract or to hold the vendee as a mortgagee in possession.

If we look beyond the pleadings to the testimony (and that, as we have seen, was by virtue of the statute made a part of the record of the case in the Supreme Court) the error of the trial court is even more apparent.

The agreement of September 12 provided for the transfer and conveyance of all cattle on the Sunflower range, branded with the named brands, "excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part." By this all the cattle belonging to the company on September 1 were to be transferred to the plaintiff, and if any of such cattle had been sold subsequently to September 1 they were to be accounted for by the company to the plaintiff. Further, the agreement stipulated for the delivery and cancellation of the notes and mortgage "in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid." By the undisputed testimony two lots of cattle, one of 69 or 70 head and the other of 34 or 35 head, were sold and delivered by the company to other parties than the plaintiff after the 1st of September. Therefore the company was to account for those cattle so sold and delivered, and the duty resting upon Ward to surrender and cancel the notes and mortgage was conditioned upon the delivery within the county of the property described within thirty days from September 12. In short, the terms of the contract were clear. Ward performed all that he was under obligations to perform. The default was on the part of the company. Ward took possession of the property delivered, managed it

successfully for several years, and still the court held that the defaulting party could take advantage of its own default, appropriate the entire profits of Ward's care and ability, and upon that basis adjudged against Ward the return of all the property then in his possession and the payment of over seventeen thousand dollars. But it is said that Ward himself repudiated the agreement because he brought suit on the first of the notes. There may have been a technical mistake in the form of the action, but there was no repudiation of the agreement, as is shown by the fact that the complaint only asked judgment for $1,500, and that Ward filed with the complaint an affidavit for an attachment, in which he averred that the payment of the sum due was "not secured by any mortgage or lien upon real or personal property or any pledge of personal property." But equity will not destroy rights on account of a mere technical mistake of counsel. It may be conceded that Ward should have brought an action in form for the value of the cattle not delivered, but it is manifest that that value was all that he was seeking to recover.

The judgment of the Supreme Court of Arizona is reversed and the case remanded to that court with instructions to reverse the judgment of the District Court and remand the case to that court for further proceedings in conformity to the views herein expressed.

True copy.

Test:

Clerk Supreme Court, U. S.